

CUSTOMARY LAW

Training Guide

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STUDY UNIT 1

Characteristics and application of customary law

1.1 Learning outcomes

After having studied this study unit, you should be able to:

- explain the concept customary law.
- differentiate between living customary law and official customary law.
- differentiate between customary law and common law.
- discuss the classification of the indigenous peoples of South Africa and its feasibility in applying customary law.
- discuss the sources of customary law.
- analyse the significance of customary law in relation to the Constitution.

1.2 Definition and concept of customary law

1.2.1 Definition of customary law

Section 1 of the Recognition of Customary Marriages Act defines customary law as:

“customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people.”

The definition of customary law as it appears in the Recognition of Customary Marriages Act brings forth three key elements:

Customs and usages

“Custom is –

- (a) A practice followed as a matter of course among a people or society; a conventional mode or form of action.
- (b) A habitual practice of an individual.
- (c) Law. A common tradition or usage so long established that it has the force as validity of law.”

Some customs, very few though, have been defined in legislation. One example is the definition of *lobolo* in section 1 of the Recognition of Customary Marriages Act. The Act defines *lobolo* as follows:

“[the]... property in cash or in kind, whether known as lobolo, bogadi, xuma, lumalo, thaka, ikhazi, magadi, emabhaka or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage”.

Indigenous African peoples of South Africa

The dictionary meaning of “indigenous” is **occurring or living naturally in an area**. Viljoen states: “‘indigenous’ people first came to be defined in opposition to those who came later (‘second peoples’ or ‘settlers’)...” For the purpose of applying customary law indigenous African peoples are the ethnic groups traditionally grouped on the basis of language and other cultural features.

Culture

Bennett captures the meaning by saying:

“In common parlance... ‘culture’ implies high intellectual or artistic endeavour... But ‘culture’ may also denote a people’s entire store of knowledge and artefacts, especially the languages, systems of belief, and laws, that give social groups their unique characters. This meaning would encompass a right to customary law, for customary law is peculiarly African, in contrast with the law of a European origin.” (Human Rights and African Customary Law (1995) 23-24)

According to Ndima culture ...“consists of the traditions and contexts of applying the laws and customs as they impact on the various aspects of social interactions.” He illustrates culture in terms of traditions of dressing, singing, dancing or speaking which take particular shapes during funerals, weddings or other celebrations. He states that “such shapes concretise into the cultures of their adherents as they begin to insist on their observance on such occasions.”

In his explanation of culture, Ndima highlights how law, custom and culture relate. He states that “law refers to the rules and principles that govern the application, administration and enforcement of the rights, obligations and responsibilities contained in the customs; whilst customs themselves are the reference points where the community’s good habits are stored as indicators of propriety in society. Customs are related to law because the latter reflects the manifestation of the former in social practice”

Ndima qualifies his submission by making the following inference: “The relationship between these concepts lies in the fact that a custom such as initiation into manhood happens in a particular cultural tradition and is regulated by a set of legal rules, which makes it proper for those people who may prefer to call it a custom, culture or law as they deem appropriate to do so.” (Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution (2013) 52)

On the basis of the different languages and other cultural features one may classify the indigenous South African peoples as follows:

Groups	Language
Nguni group	
Zulu	isiZulu
Xhosa	isiXhosa
Swazi	siSwati
Ndebele	isiNdebele
Tsonga group (sometimes referred to as Shangaan)	
Tsonga	Xitsonga
Sotho group	
Pedi	Sepedi
Sotho	Sesotho
Tswana	Setswana
Venda group	
Venda	Tshivenda

1.2.2 The concept of customary law

There are two forms of customary law in South Africa, namely, ‘official’ customary law and living customary law.

‘Official’ customary law in this context refers to the codified version of customary law which was imposed in the pre-constitutional era. Sources of ‘official’ customary law include the codes of customary law such as the Natal Code of Zulu Law Proc R151 of 1987; and the KwaZulu Act on the Code of Zulu Law 16 of 1985; textbooks; court precedents; and legislation. It has been argued that the ‘official’ version of customary generally does not reflect the customary law of the people it governs. This argument is raised from the viewpoint of dominance, in that, it was mainly the administrators who decided what the law ought to be rather than stating a true account of what the law is.

Living customary law generally consists of the unwritten customary practices that regulate the day-to-day life of people. It is said to be actual practices or customs of an indigenous community whose customary law is under consideration. Thus, living customary law is not static, it continually evolves in accordance with the changing circumstances of the community in which it operates. Notably, living customary law hinges on its acceptance by members of that particular community. According to Jobodwana acceptance means that the living customary law must conform to actual patterns of behaviour, that is, what people do, or what people believe they ought to do ('Customary Courts and Human Rights: Comparative African Perspectives' SA Public Law (15) 1 (2000) 27).

Hamnett explains customary law as follows: 'customary law which emerges from what people do, or-more accurately- from what people believe they ought to do, rather than from what a class of legal specialists consider they should do or believe....The ultimate test is not, "what does this judge say?" but rather "what do the participants in the law regard as the rights and duties that apply to them?"' (Hamnett I Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho (1975) 10).

1.3 Characteristics of customary law

1.3.1 *A family of systems*

Customary law is not really a single legal system, but rather a family of systems. Meaning that there is no single system of customary law that applies to all indigenous communities in South Africa. Different versions of customary law apply to different communities. However, principles of customary law have similarities across the various versions of customary law. There is for instance Swazi law; Zulu law and Venda law that may in some respects differ from one another. However, similarities exist especially between the indigenous African groups that share matrilineal or patrilineal forms of social organisation. These groups for instance, share common principles in areas of marriage and succession. (Himonga et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives (2014) 23-24)

1.3.2 *Non-separation of fields of law*

Customary law is not categorised in the same way as western law. In customary law, the legal system is part of culture; and is inextricably connected to the social structure and its arrangements (Van Niekerk The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective (1995) 38-39).

In Western legal systems there is a clear distinction between public and private law. The typical Western system consists of a separation of the legislative, judicial and executive organs of authority. In customary law these organs are not separate, but vest in the traditional leader, advised by his council. In traditional communities the traditional leader-in-council fulfils legislative, judicial and executive (administrative) functions.

European private law creates specific rights and imposes specific duties upon persons, such as parents being obliged to maintain their children.

Customary law on the other hand, is community-orientated. Duties and rights are communal. An example is that guardianship and custody of children are not confined to their biological parents. Children belong to a family. Each member is liable to take care of them.

1.3.3 *Distinction between civil and criminal proceedings*

Civil and criminal proceedings are not kept separate, although there is a distinction between crime and delict. Where litigation is based on an act constituting a delict as well as a crime, such as assault, the matter is dealt with as a whole. If the allegation is proved, the sentence would include an order for payment of damages and the imposition of a penalty.

1.3.4 Concept of time

Time is an important point of distinction between western law and customary law. In common law specific moments in time are often important, so that, for instance, an action has to be instituted within a certain time. Debts become prescribed after the lapse of certain periods. In customary law, however, the concept of prescription does not apply. The fact that an event did actually occur (usually as part of a process) is far more important. Delay in lodging a claim or reporting a crime may do no more than creating a suspicion that the complainant is not truthful.

In cases of seduction, the girl's family should notify the seducer's family of the defloration without delay. Delay in instituting the action may deprive the family of their claim.

There is no specific age at which someone is recognised as a "major". A person acquires full legal capacity only by getting married by customary law. The statutory age of majority (presently 18) is nevertheless the deciding factor.

1.3.5 Group as opposed to individual orientation

Group as against individual orientation is another significant difference. Western law places emphasis on the individual, who may even uphold his or her rights against the interests of the state or community. Customary law on the other hand, places emphasis on the group. Individuals only function within the context of the group to which they belong, be it family or clan.

Originally individualisation of rights was almost absent. The group and not the individual was the owner or creditor. The family head was the administrator of the family property and liable for the debts of the members of the family home. A girl could not institute an action for seduction, since the rights belong to the group and not to her as an individual. But could only institute such an action under common law.

1.3.6 Different approaches

Western legal systems adopt an abstract approach, while customary law legal systems insist on a more concrete, real and visible approach. For instance, where a wife is accused of having committed adultery, the husband is required only to prove improper intimacy (and not actual sexual intercourse). Such proof was often obtained by catching the culprit in the act, and taking possession of some of the adulterer's personal belongings, such as a walking stick, jacket or blanket. This evidence is known in Xhosa as *ntlonze*. Courts accept such evidence almost as conclusive proof of the offence.

The conclusion of a customary marriage is effected by visible acts, such as the exchange of gifts and finally handing over the bride to the bridegroom's family.

Contracts do not come into being by mere offer and acceptance. In customary law some act of performance or part performance is required.

1.4 Recognition of customary law

1.4.1 Constitutional recognition

In terms of the Constitution the Republic of South Africa 1996 customary law is fully recognised as a component of South Africa's legal system. This recognition is contained in several sections of the Constitution as follows:

Section 31(1) provides that:

"[p]ersons belonging to a cultural ... community may not be denied the right, with other persons of that community – (a) to enjoy their culture ... and to form, join and maintain cultural associations and other organs of civil society."

Section 15: Freedom of religion, belief and opinion

- (1) Everyone has the right to freedom of conscience, religion, belief and opinion.
- (2)
- (3) (a) This section does not prevent legislation recognising:
 - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

This section has paved the way for recognising customary marriages as “marriages” for all purposes. Below it will be seen though that the requirements and consequences of customary marriages have been adapted to conform to the provisions of civil marriages.

Section 30: Language and culture

“Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”

Bennett explained this provision as follows:

“By introducing a right to culture section 31 [of the Interim Constitution] does not necessarily nullify or change the previous freedom. Rather, practice of a culture must now be considered both a right and a freedom in a way that is analogous to the ownership of property: the owner is both free to use property and right to vindicate it. Thus Africans may claim to be free to pursue their culturally defined legal regime within an area delimited by the rights of others, but at the same time they have a right to insist that the courts apply customary law in appropriate legal proceedings. The freedom comprehends the generality of social life; the right requires a specific act of recognition or application”. (Human Rights and African Customary Law 1995 (26-27))

Whereas section 30 of the Constitution gives only individuals the right to culture, section 31 affords the right to individuals “*with other members of that community*”. The right to culture therefore vests in individuals as well as in communities.

This implies that the state must:

- Allow diversity;
- Preserve the existence and identity of cultural groups;
- Not discriminate against any particular cultural group; and
- Allow each cultural group to foster its separate identity, e.g. to speak its own language, to practice its distinctive religious beliefs and to have its own personal laws applied to it.

Section 211: Recognition

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or these customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

1.4.2 Recognition subject to the Bill of Rights

As shown above customary law is recognised subject to the Bill of Rights. In addition section 2 provides that the “Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” Note that this limitation does not apply to customary law only. All law is subject to the Bill of Rights.

Aspects of customary law may on the face of it be in conflict with the following constitutional provisions:

Section 9(1): Equality

“Everyone is equal before the law and has the right to equal protection and benefit of the law”.

Section 9(3) & (4) further provides that there may be no unfair discrimination directly or indirectly against anyone on one or more grounds, including age, gender or culture.

The application of section 9 in customary law may give rise a conflict between two opposing principles, namely, the right of the individual to equal treatment and the right of a group to adhere to the culture of its choice.

Section 21(3): Freedom of movement and residence

“Every citizen has the right to enter, to remain in and to reside anywhere in the Republic”.

By implication anybody may live in a communal area and not only members of the community concerned.

Section 25(1): Property

“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”.

This raises the question whether persons may be deprived of communal land rights.

Section 35(3) (f): Right to legal representation

“Every accused person has a right to a fair trial, which includes the right to choose, and be represented by a legal practitioner, and to be informed of his rights promptly.”

This raises the question whether legal representation may be prohibited in traditional authority courts.

1.4.3 The development of customary law

The primary indication on how the court should develop customary law is section 39(2):

“When interpreting any legislation and when developing the common law and customary law, every court, tribunal or forum must promote the spirit purport and objects of the Bill of Rights.”

It is significant that in terms of section 8(3) a court –

“When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection 8(2), a court –

(b) may develop rules of the common law [only] to limit the right, provided that the limitation is in accordance with section 36(1)”

The omission of customary law is probably an oversight.

Customary law, in terms of section 39(2), may be guided towards realisation of the spirit, purport and objects of the Constitution as long as such development of customary law remains within the confines of ‘interpretation’ and is exercised with a great deal of judicious care and sensitivity.

In *Du Plessis and others v De Klerk* the court also directed how courts should apply their powers of interpretation and development.

In this case the court per Sachs J at para. 178 warned against judicial law-making:

“The judicial function simply does not lend itself to the kinds of factual enquiries, cost benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions, which appropriate decision-making on social, economic, and political question requires. Nor does it permit the kinds of pluralistic public interventions, press scrutiny, periods for reflection and the possibility of later amendments, which are part and parcel of Parliamentary procedure. How best to achieve the realisation of the values articulated by the Constitution, is something far better left in the hands of those elected by and accountable to the general public, than placed in the lap of courts.”

Kerr, concludes in this regard:

“It seems to be clear that neither the central nor the provincial legislatures, nor the courts should attempt to alter any one small area of the customary law of succession or marriage. All the interrelated areas should be dealt with together.” (‘The Bill of Rights in the New Constitution and Customary Law’ SALJ (1997) 346)

However, in *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* the court declared the principle of primogeniture in the customary law of succession unconstitutional. The court declined to develop customary law because there was insufficient evidence and material before it to enable it to ascertain the true content of customary law.

In *Mabuza v Mbatha* the court held that ukumekeza (a ritual on integrating the bride in her husband's family) as practiced by the Swazi was no longer a requirement for the conclusion of a customary marriage.

In *Shilubana and Others v Nwamitwa* the court held that traditional authorities may develop customary law in accordance with norms and values of the Constitution. In casu the issue was whether a woman may succeed to a traditional leadership position.

1.4.4 Reconciling customary law with the Constitution

As discussed above, in terms of the Constitution the Republic of South Africa 1996 customary law is fully recognised as a component of South Africa's legal system. The relevant provisions of the Constitution in this regard are also discussed above.

It then becomes important to reflect on potential conflicts between customary law and fundamental human rights in the Constitution and how these should be resolved.

Recognition of customary law in terms of the Bill of Rights does not render human rights absolute where customary law is in conflict with these rights. It is important to note that the same Constitution provides that when interpreting customary law, the courts must develop it in accordance with the spirit, purport and objects of the Bill of Rights. This suggests that the courts are expected to do more than simply consider the Bill of Rights to overrule customary law rules that are incompatible with it. Therefore, any conflict between customary law and fundamental rights must be resolved by some form balancing process.

When reconciling customary law and fundamental rights, it is necessary to draw a distinction between the substance of customary values and the manner in which these values are expressed. This view calls for the retention of substantive good values concerned with the subject of customary law without their undesirable aspects.

Fundamental human rights and customary law, especially in the field of women's rights are not naturally oppositional. It is not accurate to think of human rights and customary law in that way. Instead living customary law offers space which enables access to rights and entitlements to resources within set traditional institutions. This is particularly so in respect of women's rights. This view therefore suggests that customary law is not always the villain, particularly in respect of women's rights, as it is generally projected to be.

When dealing with issues of conflict between customary law and human rights it is important to make a distinction between living customary law and official customary law. Living customary law, unlike official customary law, by its nature, is flexible and adapts to changing conditions, including those pertaining to human rights. (Himonga et al *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 37-38)

1.5 Conflict of laws

In South Africa legal conflicts occur as a result of the co-existence of South African common law and African customary law. The question often arises: which system of law – common law or customary law – should in given circumstances be applied.

For instance, when an African girl is seduced by her boyfriend, should she be entitled to claim seduction damages under common law, or should her father be entitled to claim damages under customary law?

Under the new constitutional dispensation customary law is legally not inferior to the common law. The common law therefore does not primarily apply where there is a conflict.

Before the Constitution of the Republic of South Africa 1996 came into operation section 1(1) and (2) of the Law of Evidence Amendment Act governed the application of customary law:

Their substance is as follows:

- Any court may take judicial notice of indigenous law;
- In so far as such law can be ascertained readily and with sufficient certainty;
- Indigenous law must not be opposed to the principles of public policy or natural justice (the repugnancy clause);
- The foregoing does not preclude any party from adducing evidence of the substance of a legal rule which is in issue in the proceedings concerned.

Although they have not been repealed they have become irrelevant because in terms of section 211(3) of the Constitution:

“The court **must** apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

1.5.1 Applicability of customary law

There is therefore no longer a choice of law. A court must simply decide whether an issue is based on customary law or common law.

The case of *Maisela v Kgolane* provides some guidelines. The issue in this case was whether customary law was applicable to a contract of sale. The court held that the customary law of sale applied only where the principles of customary law provide for the sale of the thing sold. It is wrong to adjudicate on a sale not governed by the principles of customary law merely because the parties are black. It is also wrong to regard a sale as regulated by indigenous law if the common law principles concerned are not known to indigenous law. A sale of a tractor is therefore not governed by the rules of customary law.

1.5.2 Distinction between common and customary law

In so far as such law can be ascertained readily and with sufficient certainty judicial officers are presumed to know the common law and statute law. They would hear arguments from lawyers on what the applicable law is, but will not need evidence to prove it. With customary law the position was different. Before 1988 commissioners were presumed to know customary law. They could take judicial notice of it, but magistrates and judges could not.

The Supreme Court did make exceptions. As long ago as 1929 the Appellate Division said that if each rule had to pass the test set for customs, applying customary law would become so time-consuming and laborious that the courts could not do their job.

There are reasons for the distinction between common law and customary law:

- (1) Customary law was not recognised as a system of law.
- (2) Customary law is generally largely unwritten.
- (3) The customs recognised as law were perceived to be outdated. But in fact many customs, or certain features, have changed as the social and economic conditions of Africans changed.
- (4) Textbooks on African customary law generally do not record the changes that have taken place. The textbook versions are sometimes referred to as “official” customary law as opposed to ‘living’ customary law.
- (5) It is well-known, and has been debated at length, that there is an ‘official’ and ‘non-official’ version of African customary law.
- (6) However, for the application of customary law the official version is readily available. This is confirmed by the SA Law Reform Commission as follows:

“... much of the official version will persist for the simple reason that we have no other, more reliable account of customary law. It is true that litigants are not bound by rules from this source. They are free to allege a better version by calling proof of a new or more authentic custom. But, if a party doing so does not meet the standards required for proving custom then the official version will prevail for want of better evidence”.

- (7) The Law Commission added that it is unfortunately not possible to mount a nationwide survey in order to establish which customs are still observed and which serve the interest of the African community. The time and resources are not available to engage in such an immense research project. Even if it were possible, the legal status of the findings would be bound to be controversial, and, no matter how sensitively done, any such statement of law is soon overtaken by changes in social conditions.
- (8) It has also been suggested that a different African customary law regime might apply in urban areas. It would mean that there are different versions of customary law throughout the country and it would create legal uncertainty. There is, for instance, no indication of what area might constitute an urban area. This means that in each legal suit the court will have to decide what effect, if any, should be given to customary law.

Public policy and natural justice – Indigenous law was not to be opposed to the principles of public policy or natural justice (the repugnancy clause).

In terms of section 1(1) of the Law of Evidence Amendment Act a court could apply customary law provided that it was not repugnant to the principles of public policy and natural justice. This is a remnant of colonial rule, when the colonial powers weighed up customary law against their own norms of morality and justice. This criterion has become meaningless.

Bennett reports that:

“During the last forty years the repugnancy proviso has been invoked hardly at all, suggesting that it is now irrelevant to the further development of customary law. It remains on the statute book as a reminder of the demeaning position of customary law in the colonial period. Doubtless for this reason, the proviso was deleted from the legislation regulating application of customary law in most of the Southern African states.” (A Sourcebook of African Customary Law for Southern Africa (1991) 133)

In view of the fact that constitutionality and not repugnancy is now the criterion, this provision has become obsolete.

The *lobolo* custom could in terms of section 1(1) above not be declared repugnant to the principles of public policy and natural justice. It is submitted that the courts are no longer bound by the provision, but it is any event unlikely that the courts will declare lobolo as repugnant to human rights.

1.5.3 Adducing evidence of the substance of a legal rule

Section 1(2) of the Law of Evidence Amendment provides that nothing precludes any party from adducing evidence of the substance of a customary legal rule which is in issue in the proceedings. The parties may therefore call an expert witness to prove a more authentic version of the law. But the courts still have to consider the evidence and declare what the law is.

Courts also have an inherent right to call for evidence on disputed or questionable legal rules. The courts will, however, not without more ado intrude upon the parties' presentation of their cases. A court is more likely to suggest that an expert witness be called by one of the parties to clarify an uncertain point of law.

In *Ngcobo v Ngcobo* the Appellate division held that African customs and usages form the unwritten law and many of these must be known to the judges and ascertainable from decided cases and treaties upon African custom. The judge said that if we insisted upon each such custom being proved in the same way that trade usages or customs are proved under common law, the application of customary law may become unworkable as it would become too expensive.

The courts presently appreciate the evidence of experts on customary law. Several recent judgments have been based on their evidence.

All the same the courts seem to ascribe to themselves a knowledge that customary law has changed. The outcome is unpredictable.

In *Mabuza v Mbatha* for instance the judge made a sweeping statement that –

“African customary law has evolved and was always flexible in application. There is thus no doubt that the siSwati custom of ukumekeza (i.e. the formal integration of the bride into the family of the bridegroom, the custom being one of the three requirements for a valid marriage according to siSwati customary law), like so many other customs, has somehow evolved so much that it is probably practised differently from what it was centuries ago. It is inconceivable that ukumekeza has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases.”

This generalisation may now be regarded as *stare decisis* while Swazi communities and individuals still regard ukumekeza as a requirement for a marriage.

In *Alexkor Ltd and Another v Richtersveld Community and Others* the court held that customary law can be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. Caution is to be exercised when dealing with textbooks and old authorities because of a tendency to view indigenous law through the prism of legal conceptions that were foreign to it. In the course of establishing indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides.

1.5.4 Conflicts between different systems of customary law

Section 1(3) of the Law of Evidence Amendment Act provides that in any suit or proceedings between blacks who do not belong to the same tribe, the court must not, in the absence of any agreement between the litigants regarding a particular system of indigenous law to be applied, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides, carries on business or is employed. If two or more systems are in operation at that place (not being within a tribal area the court shall not apply any such system unless it is the law of a tribe (if any) to which the defendant or respondent belongs.

In *Zwane v Twala* it was held that the Appeal Court for Commissioners' Courts has no power to alter African customs or to attempt to introduce any uniform system of customs, however, desirable it may be, since the court would be usurping the functions of the legislature. When a statute (such as the Natal Code of Zulu Law) deals with a custom, then the courts are bound to follow the custom as laid down in the law.

There is nothing to preclude the parties from agreeing to be bound by customs of the tribe in whose midst they are temporarily resident. This rule is unsatisfactory, because, among others, there seems to be no reason why the defendant's law should be preferred.

The South African Law Reform Commission has recommended that the provision be scrapped and in the absence of any form of agreement, the courts should apply the law with which the case has

its closest connection. (The criteria for determining 'close connection' will in fact be similar to those used for selecting domestic systems of common or customary law.) Causes of action involving land and succession may conveniently be referred to the law of the place where the land is situated and the deceased's personal law, respectively.

1.6 Sources of customary law

Sources of customary law include the following:

1.6.1 *Customs and usages*

Customs and usages of various cultural groups constitute the main source of customary law. The following requirements have to be met in order to establish the existence of a particular custom or usage:

- the custom or usage must have been in existence for a long period;
- the relevant community must generally observe the custom or usage;
- the custom or usage must be reasonable; and
- the custom or usage must be consistent with or subject to the Constitution and other legislation.

Courts generally rely on expert evidence in order to prove the existence of a custom or usage. In *Sigcau v Sigcau* 1944 AD 67 the court held that "the only way in which the court can determine a disputed point, which has to be decided according to Native Custom is to hear evidence as to that custom from those best qualified to give it and to decide the dispute in accordance with such evidence as it appears in the circumstances to be most probably correct."

1.6.2 *Legislation*

The official version of customary law is mainly found in legislation. An example of such legislation is the Recognition of Customary Marriages Act, which regulates customary marriages in South Africa.

1.6.3 *Judicial precedent*

The courts constantly interpret various aspects of customary law, subject to the provisions of the Constitution. In that way, customary law develops.

Many important decisions have been made by our courts. These decisions generally form precedent.

1.6.4 *Scholarly and other writings*

Scholarly and anthropological writings are also used as a source of customary law. Caution however must be exercised when dealing with old writings because of the tendency to view customary law through the prism of legal concepts that were foreign to customary law.

Commission Reports can also be used to determine the rules of customary law.

1.7 Self-assessment

Indicate whether the following statements are **TRUE** or **FALSE**:

1. Section 1 of the Recognition of Customary Marriage Act 120 of 1998 defines customary law as customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people.
(a) **TRUE**
(a) **FALSE**
2. Lobolo is defined in the Recognition of Customary Marriages Act 120 of 1998 as “property in cash or in kind, whether known as lobolo, bogadi, xuma, lumalo, thaka, ikhazi, magadi, emabheka or by any other name, which a prospective wife or the head of her family undertakes to give to the head of the prospective husband’s family in consideration of a customary marriage”.
(a) **TRUE**
(b) **FALSE**
3. Customary law is a single legal system and not a family of systems.
(a) **TRUE**
(b) **FALSE**
4. Customary law is intrinsically unwritten.
(a) **TRUE**
(b) **FALSE**
5. Customary law consists of a separation of the legislature, judicial and executive organs of authority.
(a) **TRUE**
(b) **FALSE**

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STUDY UNIT 2

Social structure of indigenous communities

2.1 Learning outcomes

After having studied this study unit, you should be able to

- provide an analysis of the customary law kinship system.
- discuss the significance of customary law structures.
- explain the interaction between law and religion.

2.2 The scope of social structures

This study unit deals exclusively with traditional African concepts and practices in those societies who have not entirely adopted a European lifestyle.

There are vast rural areas where even by driving through one would see traditional homesteads. Looking closer and interacting with the residents one would realise that traditional values are still observed and the practices still followed.

We appreciate that although some have been abandoned or modified, traditional concepts still form the background of many African peoples – rural and urban. Hence we feel that students should have an insight, albeit not in depth, of the socio-cultural background of the rules of customary law. (See further Mbiti African religions and philosophy (1969) Preface xi).

At the same time students should know that phenomenal changes have taken place. A detailed account of the changes is not called for, but a crisp mention of some will put the student in the picture.

1. Many (probably most) Africans have become detached from their communal (tribal) land. They don't live there anymore. But a remarkable number still have a link with family members out there.
2. Africans (everybody else actually) have become immersed in modern culture.
3. People inevitably formed new associations – professional, club, sports, trade unions, religious – the list is endless.
4. Inter-group marriages are so many; they are not even noticed as such. This occurs across the whole 'ethnic' composition, including marriages between African and members of other population groups.
5. Migratory labour still occurs on a vast scale. Men – also women – leave their traditional homes to work in industrial areas. Some stay there – others go back home after a spell of work.

2.3 The system of relationship

The organisation of African social groups is based on the fact that the individual members are assimilated with the group (be it family, clan or community) and their conduct must take that into account. It is aptly described by Hoernlè as follows:

“By this is meant the more or less permanent framework of relationships between the members of a community which manifests itself in an ordered group life with reciprocal rights and duties, privileges and obligations, of members, determining behaviour patterns of each individual member towards other members, and moulding, thoughts and conduct of members according to these patterns so that it is only in and through them that the individual can achieve his personal self-realisation and participate in the satisfactions offered by the life of his community” (Hoernlè “Social Organisation” in Schapera *Bantu-speaking Tribes of South Africa* (1966) 67)

2.4 The system of kinship

Kinship is the state of being related by blood. Kinship has an influence on the structural organisation of communities (Mqoke 'The Customary Law of Delict and a Bill of Rights' De Jure 25 (1992) 464). It forms the basis of social life. It is not merely a system of classifying persons as parents, children and relatives, it dictates the behaviour of the members amongst each other. They are not only related by blood, but conscious of being related in character, origin and have the same value system.

Africans emphasise patrilineal descent, which is calculated by reference to paternal lineage. In practice it means that the property in a deceased estate devolved upon a son of the deceased or nearest male survivor in the same lineage (It is however important to note that this has been abolished by the Reform of Customary Law of Succession and Related Matters Act II of 2009).

Kinship also applies to name giving and forbidden or preferred marriages. The latter is quite complicated, but boils down to the fact that marriages within some degrees of relationship are preferred whereas others are prohibited.

2.5 The social composition

2.5.1 The household

The smallest identifiable unit is the family who lives in the same house or cluster of houses. It would consist of a man and his wife and their unmarried children, but often includes married children and even brothers and sisters of the husband or his wife.

Polygyny is still a recognised institution, but households are nowadays seldom based upon a polygynous family. In the rare cases each wife has her own house, fields, cattle and domestic utensils which on her death would devolve upon her children. The wives in a polygynous household are normally ranked in order of priority of marriage.

2.5.2 The family group

The family group consists of patrilocal related groups consisting of different families descended from a common ancestor. The group may, however, also include relatives of other family members.

2.5.3 The community ward

The ward is composed of family groups who can trace back their origin to a common ancestor. Schapera defines it as –

“A number of family groups, living together in the same village, make up a ward. The unit may be defined as a collection of households living together in their own hamlet and forming a distinct social and political unit under the leadership and authority of one hereditary headman...” (Schapera *A Handbook of Tswana Law and Custom* (1955) 19)

2.5.4 The community

The largest social unit is the community (tribe) consisting of a conglomeration of the aforementioned groups – mostly patrilineal descendants, but would invariably include strangers. The criterion for membership is allegiance to the traditional leader.

The community is a politically independent entity, nowadays only subject to overriding control of the government. The control is exercised in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 – more particularly the laws adopted by each province. It has to comply with the statutory provisions but in essence it manages its own affairs under the leadership and authority of the kgosi.

2.6 The present social structure

The social structure as described above has, to a large extent, remained intact. However, the traditional lifestyle has undergone change under western influence, as shown above. The changes are manifested in all spheres of life, but the traditional lifestyle and customs still assert themselves. Under the influence of Western culture new social groupings developed, among others Christian churches, educational institutions, benefit associations and (also burial) societies.

2.7 The legal significance of social structures

2.7.1 Human-orientated approach

Customary law is primarily concerned about persons. Mbiti describes this as everything being seen in relation to persons (human beings). This human orientation is particularly applicable to human beings as groups. The concept of *botho/ubuntu* implies that people are more important than rules. People create rules to serve them. During a trial in a traditional authority court, one will observe that the members of the court focus on the people concerned and not as much on the facts as such. The aim of the courts is restorative justice rather than punishment or retribution in terms of rules of law.

2.7.2 Group-oriented approach

African social systems are group-orientated as shown above. It is said that a person is only a person in relation to others. The expression in *Sotho* is *motho ke motho ke batho*, in *Nguni*: *umuntu ungunmuntu ngabantu*.

The community or group – be it family, kinship group or tribe – is more important than the individual. In this context harmony must also be maintained with the ancestors. The group's needs enjoy precedence.

In modern social circumstances groups have largely disintegrated but group interests still prevail, albeit not extensive. There are moreover an estimated number of more than 20 million Africans in rural areas, but it must be admitted they have also changed in character. They are part and parcel of the Western consumer society.

2.7.3 Western social structures

On the contrary western social structures have an individual orientated approach. It is characterised by nuclear families that have individual and group rights and duties. Our Bill of Rights is characterised by 28 rights of unqualified freedom to act in their own interests. Therefore, each member of the community is protected by a variety of laws to safeguard free enterprise, freedom of religion and unrestrained economic activity.

This has an immense influence on African societies. Although at heart they may be human or group-orientated they also enjoy individual rights and freedoms. The “human” in the Bill of Rights is a personal right.

The legislation and the courts have adopted the principles of the Bill of Rights by among others, decreeing that the Eurocentric law of intestate succession applies to estates of Africans. Furthermore, customary marriages are now regulated by legislation, that is, the Recognition of Customary Marriages Act 120 of 1998. Legislation regulates the requirements for entering into a valid a customary marriage including, the marriageable age of the parties and issues of consent. The Traditional Leadership and Governance Framework Act 41 of 2003 reconstituted traditional authorities in a statutory mould. They are, as under colonial and apartheid rules, creatures of statute.

2.8 Religion

This section does not deal with religion for its own sake but to show its place in the social system of Africans. In this section we discuss two mainstreams of religion, namely Christianity and the tradi-

tional African belief system. We might emphasise that this discussion is on customary law and not religion and magic.

2.8.1 Christianity

Christianity may be said to be the official religion of Africans. They have for more than 200 years been exposed to missionary teaching about Christianity. Generally they were expected to become 'converted' and thereafter lead a devout Christian life, abide by Christian concepts of morality – most significant, perhaps, not to practice polygamy. Non-compliance with Christian morals was depicted as sin for which one may suffer eternal damnation.

Equally important was the fact that missionaries introduced developments such as schools, European clothing, medical services and hospitals. They published books in the local vernacular.

It is not known to what extent Africans practice Christianity. There are a number of denominations. It is generally known though that all Christian churches have lost their former influence on account of technical innovations, world-wide communication and the development of a consumer society.

2.9 Belief in a Supreme Being

2.9.1 Nature and designation

Amongst all the ethnic groups, there is a widespread belief in a Supreme Being who is regarded as the creator of all things and as the giver of life. There are a variety of traditions which recount the way in which this Supreme Being is held to have created humans and animals.

Each of the different ethnic groups has a specific generic term with which they refer to this Supreme Being.

2.9.2 Ways in which the Supreme Being is perceived

Due to the patrilineal organisation of the African peoples of South Africa, the Supreme Being is invariably regarded as male, and all the characteristics associated with a man of high rank and status are attributed to this Being.

2.9.3 Ways in which the Supreme Being reveals himself

Normally the Supreme Being does not reveal himself to humans, with the result that he has relatively little direct influence in the daily lives of people. When the Supreme Being chooses to reveal himself, he does so by means of impressive natural phenomena such as storms, droughts, floods, plagues and epidemics.

2.9.4 Services to the Supreme Being

Normally humans have no direct contact with the Supreme Being. For this reason one can seldom speak of direct prayer or service to the Supreme Being. If serious problems need to be solved, the Supreme Being can be approached through the mediation of the ancestral spirits.

2.9.5 Belief in ancestral spirits

Belief in the influence of ancestral spirits and their veneration is an element central to the religions of all black peoples of South Africa. It is based on the belief that the living and the dead influence each other. The ancestral spirits have virtually unlimited power over the lives of their descendants on earth. If the ancestral spirits are offended or neglected, they may withhold good fortune from their descendants on earth and may bring misfortune upon them. This belief results in certain acts of veneration being observed to ensure the continued goodwill of the ancestral spirits or to restore good relations with them.

2.9.6 Name, coming into being and characteristics of ancestral spirits

Ancestral spirits are usually only referred to in the plural (Xhosa: *amathongo*; isiZulu: *amadlozi*; siSwati: *madloti*; Sotho and Tswana: *badimo*; Tsonga: *swikwembu*; Venda: *mezimu*).

The ancestral spirits retain their former social status as well as individual characteristics after death. They are benevolent in that they act as guardians of the living. Evil and sickness cannot touch a person unless the ancestral spirits are negligent or have decided to abandon their living descendants. The ancestral spirits have the power to give humans and animals good health, to increase property and to ensure good harvests.

2.10 Impact of religion on law

There is no African religious code of law. The reason why we devoted some of space to the African religion generally is that to a certain extent African culture is intertwined with religious concepts. It is aptly explained by Mönnig as follows:

“The legal system of the Pedi supports their religious system, and vice versa. Their ancestor worship includes the belief that the ancestor spirits guard the rules of conduct of their descendants who have inherited their norms as the traditions of their forefathers. As any breach of these norms may adversely affect not only the wrongdoer but also the whole tribe, the legal system is used to ensure that these norms are maintained. The rules of conduct are therefore generally maintained by the force of both supernatural and legal sanctions.” (Mönnig The Pedi (1967))

Mqeke puts it as follows: “The relationship between law and religion finds expression in certain basic assumptions regarding the role of ancestor spirits in the administration of human affairs – the belief that the well-being of society depends upon the maintenance of good relations with the ancestors. In the administration of justice this belief manifests itself in the tendency to associate certain kinds of conduct with sin, that is, as being an affront to the founding fathers (ancestors) (‘The Customary Law of Delict and a Bill of Rights’ De Jure 25 (1992) 463).

Examples would require explanations that may take us too far afield. We may mention two in passing: There is still an awareness that the ancestors may and do intervene in the lives of descendants, and that traditional leaders should be obeyed and respected. The controversy around the right to bury a deceased family member (where and by whom) is an outstanding example of the African belief that the deceased lives beyond death. These deceased are often referred to as “the living dead”.

It is therefore important to note the impact of religion on customary law while, realising that in European societies nowadays religion, morality and law have parted ways.

2.11 Self-assessment

Indicate whether the following statements are **TRUE** or **FALSE**:

1. African relationships are primarily family-orientated.
(a) **TRUE**
(b) **FALSE**
2. The essence of kinship is relation by blood.
(a) **TRUE**
(b) **FALSE**
3. Africans are said to be human-orientated because the group is more important than the members individually.
(a) **TRUE**
(b) **FALSE**
4. There is no code of customary religious law. However some religions and practices do have an influence on customary law.
(a) **TRUE**
(b) **FALSE**
5. Africans firmly believe in the existence of a Supreme Being.
(a) **TRUE**
(b) **FALSE**

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STUDY UNIT 3

Contracts

3.1 Learning outcomes

After having studied this study unit, you should be able to

- explain how contracts are concluded in terms of customary law.
- differentiate between the various customs in terms of which lobolo property may be acquired.
- identify specific contracts in customary law.

3.2 General principles

In this study unit various contracts and contractual relationships that exist in customary law are discussed. While there are various forms of contracts known only to customary law, the most common one is the *lobolo* agreement, including other contracts associated with it. The *lobolo* contract is almost invariably concluded in anticipation of a marriage, be it by customary or civil rites. The contract is also specifically protected in the sense that no court may declare that it is against public policy or natural justice.

3.2.1 Parties

The parties may be two individuals. However, as shown in the section on the social systems, traditional communities are group or family orientated. Thus the parties to a contract might be two families or family heads will conclude a contract on behalf of the family. A family head will also accept the liability for a family member who enters into a contract with his or her consent.

In present circumstances individuals increasingly own property. It follows that they may enter into individual agreements in regard to such property, even with members of the same family.

Ownership has also become individualised by virtue of the fact that a traditional male heir does not ipso facto inherit the deceased's property and shoulder his liabilities in intestate succession. The property devolves in terms of the Intestate Succession Act, broadly speaking meaning that individual family members succeed to a deceased's estate. If the traditional heir (normally the deceased's eldest son) does not succeed to the family home and property he can surely not be said to dispose of family home property or fulfil obligations entered into by the family group members of his family.

The authority of a family head to represent his family arises by operation of law. In other words he does not need specific empowerment.

There are nowadays many female headed households. In view of the equality clause in the Bill of Rights they would have the same powers and duties as a male family head. Moreover, in terms of section 6 of the Recognition of Customary Marriages Act 120 of 1998 women have the same status and capacity as their husbands (marital power no longer exists in either common law or customary law marriages, and a married woman is no longer considered to be a minor). That also detracts from the capacity of the traditional male family head to enter into agreements or accept liability on behalf of the family, or for that matter the group as a whole.

As a result of the HIV / AIDS pandemic in Southern Africa, there are an increasing number of child-headed households. In certain communities it is agreed that no child is an orphan. Meaning that children from a deceased sibling are taken in to be raised as one's own and not left to head a household. It however appears that certain households are headed by children. At this stage the contractual rights of the heads of such household are uncertain, and common law will probably be the yardstick to determine such liabilities.

3.3 Specific contracts

The general principles outlined above also apply to specific contracts. However, specific contracts are entered into and performed in a wide range of circumstances. For them one might reduce requirements for a specific case, such as a loan, but the next contract by the same name, e.g. loan, may be entered into and performed in vastly different circumstances. In the case of common law contracts requirements may be built up from precedents, but in customary law there are no binding precedents. Each dispute about a contract in a traditional court would be dealt with on its merits.

Some specific contracts are outlined below:

3.3.1 Lobolo

This is defined by the Recognition of Customary Marriages Act as follows:

“...the property is cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage”.

Although this definition may imply that lobolo is given only in respect of a customary marriage, in practice lobolo is also given in anticipation of civil marriages. In *Ngema v Dabengwa* (case no: 2011/3726) the court held that it is not uncommon for persons to enter into lobolo negotiations which are successful and also to have a civil marriage. It has been indicated that no respecting African woman would regard herself as properly married without lobolo being given for her hand in marriage.

3.3.1.1 Parties to the lobolo agreement

It is evident from the definition above that the parties to this agreement are the prospective husband or his family head and the family head of the prospective wife. In the case of breach, the lobolo agreement may be enforced by means of court process.

3.3.1.2 The nature of lobolo

The following factors are relevant in respect of the *lobolo* agreement. *Lobolo*:

- Is fixed by agreement in some communities;
- Is fixed by customs in some communities;
- May be varied by agreement;
- Is generally reduced if the bride is not a virgin;
- Is limitless in some tribes; and
- Is transferable before consummation of the marriage either in part or in whole.

3.3.1.3 Position of lobolo at termination of the marriage

Normally at the dissolution of the marriage due to fault on the part of the wife, *lobolo* is returned to the husband. Where the husband was to blame for the termination of the marriage, at least a portion of the *lobolo* is returnable to mark the dissolution. Where children were born during the marriage, *lobolo* is usually not returnable.

The extent of the *lobolo* to be returned depends on various factors, for example, the number of children born and the duration of the marriage. It is, however, very unusual and rare to insist on the restoration of *lobolo* at the dissolution of a marriage these days. Where a person wishes that lobolo be returned to him, the *lobolo* holder has to be cited as a party to the divorce proceedings so that an order may be obtained against him or her. If this was not done, the *lobolo* holder may be sued for such return after the dissolution of the marriage.

3.3.1.4 Obligations that may arise from the provision of *lobolo*

It may occur that a person does not have enough to provide for his *lobolo* needs. In such cases, he may approach family members and friends to help him in this regard. The agreement entered into is solely regulated by customary law. This agreement normally relates to a loan to settle the required *lobolo*. The loan may take the form of *ukwethula*, *ukwenzelela* or *ukufakwa*.

3.3.1.4.1 *Ukwethula*

This occurs when a man who is married uses property belonging or allotted to one of his houses in order to provide *lobolo* for a further wife. The *lobolo* to be received for the eldest daughter born of his marriage is usually indicated as a source from which the liability is to be met.

Ukwethula may also arise where property is taken from a house in order to provide *lobolo* for a son of another house and when the *lobolo* that would be required for a woman in a house is allocated to a son in another house or used to settle a debt of another house.

3.3.1.4.2 *Ukwenzelela*

Under this custom cattle are given to a man to enable him to pay *ikhazi* for his wife. This may take place where he has a few of his own and needs them to be supplemented. The helper is usually a relative, but may also be a stranger.

In the absence of express agreement to the contrary, cattle so given are a gift. Where it is the intention that a refund should be made it is usually agreed that such refund will be made from the *ikhazi* received from his first daughter. And if the recipient dies without having a daughter, his heir becomes liable to refund the cattle, irrespective of the assets in the estate.

3.3.1.4.3 *Ukufakwa*

It is not unusual for *ukwenzelela* and *ukufakwa* to be confused. The salient difference between the two was clearly explained in the leading case of *Nobumba v Mfecane*.

Under the *ukufakwa* custom a refund is always intended and the source is the *ikhazi* of the girl in connection with whose ceremonials the loan was contracted.

Under *ukwenzelela* the giver has to wait much longer if there is to be a refund at all because the source is the *ikhazi* of the daughter born of the wife from whom the cattle are being contributed.

3.3.2 Farming out (*mafisa, sisa or nqoma*)

Farming out is another form of contract known in customary law. This contract is defined by the KwaZulu-Natal codes as:

"a custom whereby cattle or other livestock are deposited by their owner with some other person on the understanding that such person shall enjoy the use of them, but that the ownership shall remain with and increase accrue to the depositor."

This has always been and still is a popular custom among small farmers, not only among the Xhosa people, but also among the rest of the indigenous people of Southern Africa. Among the Zulu people it is called *ukusisa*, among the Sotho and Tswana communities it is called *mafisa*, and among the Shangaan, *fuyisa*.

Usually only cattle, goats and sheep may be *mafisa* animals. The Bafokeng exclude dogs, cats, pigs and fowls.

Mafisa cattle must be kept distinct from any cattle the herdsman may possess. The keeper may use the oxen for ploughing, the cows for milk and generally use the animals in the same manner he would if he were the owner. Whatever is earned from the produce, for example, the proceeds from the sale of the milk, belongs to the keeper.

The keeper is responsible for the well-being of the animals while they are in his keeping. He must exercise the same degree of care and diligence in looking after *mafisa* animals as he would if he was their owner. The keeper has a duty to restore the animals to the owner whenever they are claimed and he must then account for all losses not previously reported and also for all increases (e.g. offspring). Losses through death, straying, theft or other causes must be immediately reported to the owner and

where an animal has died the skin must be produced. If he fails to report loss or to produce the skin of a dead one he must “vusa” or refund it.

The keeper takes sole charge of the animals for an indefinite period that can be brought to an end at any time by either party. The parties may also agree upon a definite period but that is unusual.

Over and above the use of the cattle the keeper is entitled to one beast at the end of the contract period, but the owner may give more. The remuneration also applies when other animals are placed in *mafisa*, for example, it is customary to award the keeper a lamb when he has taken care of sheep.

After a reasonable time has elapsed or after a longer period the owner will claim his animals and once the claim is made the keeper must return them. The keeper may terminate the contract at any time but he should first discuss this with the owner so that the owner can receive proper notice and make arrangements accordingly.

In summary, the owner of *mafisa* has the following rights and duties:

- The owner retains his ownership of the stock and its offspring, and may vindicate it against even *bona fide* third parties. The stock may not be attached in the payment of the debt of the mafisa holder.
- The owner has the right to inspect the stock at any reasonable time and to earmark it.
- The owner is entitled to terminate the agreement at any time.
- The owner runs the risk of loss not caused through the mafisa holder's negligence.
- If the mafisa holder unlawfully alienates the stock for his own benefit, the owner has a claim for damages.

(Himonga et al *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 195)

3.4 *Isondlo*

Customary law makes provision for the payment of compensation (Zulu-Xhosa: *isondlo*; Tswana: *kotlo*) to a person for the care of a child who is not a member of his group. In rare cases *isondlo* is payable in respect of the care of adults, for example, mentally deficient persons.

The duty to pay *isondlo* may arise from an express agreement, in which case it is contractual. The duty may also arise from the circumstances of each case, for example, from gratuitous intervention without a mandate and thus *quasi*-contractual.

It is a feature of African society that a child born away from its home is left to grow up as its place of birth. At a later stage, however, the guardian will turn up and claim custody. It is the right of the person who brought up the child to claim a maintenance fee which is called *isondlo*, derived from *ukondla* (to maintain). The maintenance fee is a beast for each child and it is known as the *isondlo* beast. It is immaterial whether the child is a boy or a girl.

3.4.1 *Traditional health practitioners*

Parliament has officially recognised traditional health practitioners as health practitioners'. The Traditional Health Practitioners Act regulates the training, registration of and practices of traditional health practitioners which are a prerequisite for a legitimate profession.

The services rendered by traditional health practitioners are so profuse and the outcomes (including supernatural) are so unpredictable that a description of each one and of the permissible treatments will be necessary to formulate contractual rules that will apply only in the case of a particular agreement, the performance, remedies for failure and termination of agreement. But one may assume that the general principles that apply to modern medical services apply with the necessary changes according to legislation. It is quite unlikely that health practitioners abide by the provisions of this. Many, probably most, of them are not aware of the Act.

3.5 Self-assessment

Indicate whether the following statements are **TRUE** or **FALSE**:

1. Farming out is a contract whereby cattle or other livestock are deposited by their owner with some other person on the understanding that such person shall enjoy the use of them, but that the ownership shall remain with and increase accrue to the depositor.
(a) **TRUE**
(b) **FALSE**
2. *Ukwenzelela* takes place when property belonging to one house is used to provide *lobolo* for a son of another house.
(a) **TRUE**
(b) **FALSE**
3. *Mafisa* refers to the *ukwethula* custom.
(a) **TRUE**
(b) **FALSE**
4. In practice *lobolo* is also given in anticipation of civil marriages.
(a) **TRUE**
(b) **FALSE**
5. The Recognition of Customary Marriages Act confines *lobolo* to a specific number of cattle.
(a) **TRUE**
(b) **FALSE**

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STUDY UNIT 4

Law of delict

4.1 Learning outcomes

After having studied this study unit, you should be able to

- outline the principles of delictual liability applicable in customary law.
- provide an analysis of the role of a family head in delictual claims.
- discuss the common law remedies applicable in customary law delictual claims.

4.2 Delict

A delict in customary law is, broadly speaking, a legal wrong. In customary law there is no clear distinction between delict and crime. There is an overlap and in traditional courts the presiding officers will often combine the two into one, by adjudicating a case as a crime, meting out punishment, but also as a wrong done to the complainant, calling for redress or compensation.

The best way to distinguish between the two is that in crime an offence is committed, while a delict is committed when there is an unlawful infringement of a legal right. The rights protected by delict may be one of four kinds:

- Real rights (in things, for instance a right to use one's property);
- Obligations (duty of performance, e.g. a duty to prevent one's animal from destroying a neighbour's crops);
- Guardianship (mostly of children); and
- Respecting personal integrity of others, (for instance to refrain from insulting others).

Thus, if there is an unjustified violation of any of these categories of rights it could lead to a claim for delictual damages for resultant loss, or to assuage the feelings of the person who has been insulted or defamed. Some delicts recognised in customary law are discussed below.

4.3 Intent and negligence

It stands to reason that a delictual claim will succeed only if the wrongdoer had intent or negligence. There are no clear-cut definitions of these two concepts in customary law. The courts will determine an issue on the facts presented. There are no hard and fast rules that may be applied across the board.

4.4 Group liability

African communities are characterised by group rights and obligations, in terms of the communitarian ethic described above. Delicts committed in group context do not justify a claim for compensation for patrimonial loss nor for damages for satisfaction. Delicts in a group call for discipline or restoration of the status quo within the group. It may lead to discipline by the family head or group members, but they share obligations incurred. A member of a group will not easily initiate a delictual claim against another member of the group. Within the modern context and the increasing awareness of common law, individual claims may increase. This may be particularly in an urbanised situation. Furthermore, claims that involve youth may become increasingly difficult, as youth do not necessarily recognise customary law, and orientate themselves to an individualist society.

4.5 The liability of the family head

A family head may be held liable for delicts committed by members of his family. This liability is justified on the ground that the family head exercises control over the inhabitants of the family home. As the nature of the family is changing among traditional communities the liability of the family head may change or not be recognised.

The liability is applicable only to delicts recognised or known to customary law. As this liability is not based on blood relationship, the family head is liable for such delicts even in cases where there is no blood relationship with the perpetrator, as long as the delict was committed while the perpetrator was living in the family home of such family head. The fact that a person is married by common law does not mean that he or she can escape this liability if he or she generally follows a traditional way of life. The family head has to be sued in one and the same action as the person who committed the delict, that is, the liability of the family head is accessory.

As mentioned, there is no clear distinction between criminal and private law sanctions and procedure in customary law. This is due to the fact that an individual in customary law is protected through his or her family. Thus, where a delict has been committed against an individual, it is the family head who institutes the action on behalf of the family and the prejudiced individual.

Where an individual institutes the action, he or she has to be supported by the family head or his or her representative. These principles are illustrated by two kinds of delictual liability in customary law, namely, what may be termed sexual delicts and the vicarious liability of the family head for delicts committed by members of the family. The family head institutes the actions on behalf of the family members and also for delicts committed by members of the family either as a defendant or co-defendant.

4.6 Women as family heads

Customary law is imbued with the concept of a male family head; Bekker defined “family head” as follows:

“Thus the term “family head” generally, unless the contrary is apparent, denotes the head of the family, namely, a black male who has married one or more wives by customary rites, and may and does include the head of the family, being his heir or, if the heir is a minor, the legal guardian of the heir until the latter becomes emancipated.” (Seymour’s Customary Law in Southern Africa, (1989) 71)

In the current legal dispensation it is no longer tenable to confine family headship to males only. Although the courts have not expressed themselves in the matter, it may be safely assumed that women may also be regarded as family heads. This is based on the fact that in terms of section 9(3) and (4) of the Bill of Rights, nobody may unfairly discriminate against anyone on, among others, the grounds of gender or sex.

Moreover section 6 of the Recognition of Customary Marriages Act provides that the wife in a customary marriage has:

“...[O]n the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any powers that she might have at customary law.”

In *Mabena v Letsoalo* it was held that a girl’s mother was legally justified to negotiate for lobolo and receive it in respect of the girl: she is also justified in acting as the girl’s guardian in approving her marriage.

In fact there is nowadays many female-headed households so that where reference is made to “family head” below it would include female family heads. In practice a wife is unlikely to take over from the husband, but a widow, divorcee or never-married de facto family head would obviously be entitled to fulfil the role of family head in cases of seduction or impregnation of unmarried girls.

Where customary law is still respected one could logically expect that female family heads will play the same role as males including liability for delicts committed by inhabitants of their family home. However, social structures are complex and increasingly diversified, and depending on the delict a female family head may involve a male relative to handle a case which she finds difficult.

4.7 Prescription

Prescription as known in the common law is unknown in customary law, including cases of delict. This is also formalised in section 20 of the Prescription Act 18 of 1969:

“In so far as any right or obligation of any person against any other person is governed by Black law, the provisions of this Act shall not apply.”

The rule is that a claim does not prescribe, but the passage of time makes it more difficult to prove it because some persons involved might have died, while others cannot clearly recollect the events. In real life the claim will fall away naturally owing to the passage of time.

4.8 Specific delicts

4.8.1 Wrongs against the person

4.8.1.1 Defamation

There is no distinct claim for defamation (injury to reputation). An allegation that a person is, for example, a thief, sorcerer or seducer, is regarded as “spoiling his name”. If the allegation is true, it is no ground for legal redress. Even if it is untrue it is considered as mere abuse.

A claim for defamation is therefore not known. However, in the following typical African scenario a claim for damages is possible:

- Where a person is accused of witchcraft, for example, saying a person is an *umthakathi* (witch) or *gqwirana* (abusive name for a witch).
- An allegation that a man has given a girl a love potion (*phosela*).

4.8.1.2 Bodily injury

Generally a person is not entitled to damages for injury to his or her own body. It is said that a person cannot eat his or her own blood. In KwaZulu Natal the Code of Zulu provided for such an action, but elsewhere injury to a person is no more than a crime for which the assailant may be punished.

A person who has been injured may institute a common law claim for damages and pain and suffering and actual expenses incurred as a result of the injury.

4.8.1.3 Rape

This is the forcible sexual violation of a woman. It is under any circumstances a serious offence for which severe punishment may be meted out. Generally it may end in the regional court or high court, resulting in imprisonment.

4.8.1.4 Homicide

Traditional authority courts may not hear criminal cases of murder. It may be tried only in the high court or regional courts. Infanticide likewise falls outside the competence of the traditional authority. It would be difficult to distinguish between a killing as a crime or a delict. In cases where a distinguished person is convicted of murder he may be liable to a dependant for loss of support

4.8.2 Seduction

Seduction may be defined as sexual intercourse by a man with a virgin with her consent. The rationale behind a claim for damages by the father of the girl is that the seduction impacts negatively on anticipated lobolo negotiations and subsequent agreement. Details differ from community to community, but a brief outline of the position in KwaZulu-Natal will give the reader an idea of what it is all about.

The seduction of an unmarried female gives rise to an action against the seducer for damages for the *ngqutu* beast. In addition the seducer is liable to pay one beast for each and every child the woman bears with him. If, however, the children are born during the subsistence of an engagement no

claim for damages can be recognised unless the marriage does not take place. If the seducer marries the woman, all payments except for the *ngqutu* beast, form part of the *lobolo*. A claim for seduction is extinguished by the death of the girl seduced unless her death is due to child-birth resulting from such seduction.

The wrong of the seduction is one essentially against the father or guardian of the girl and that a family head may be held responsible for such a wrongful act committed by an inmate *of his family home, apply among most of the communities. The matter was clearly stated in Mbongwana v Ngolozela and Gila* as follows:

“It is the Native father who suffers real injury, for while among the whites, the injury is more to the outraged sense of propriety and morality, yet in Native cases the injury is real and material; for the father looks to his daughters to build up the fortunes of the house by means of their dowries (*lobolo*), and the deflowering of any of his daughters has the immediate effect of depreciating their marriage value.”

Where the action is to be instituted in terms of customary law, the father of the seduced woman is the proper person to institute the claim. He acts in this case in his personal capacity as an aggrieved party. The amount of compensation payable if he succeeds has to have a bearing with the amount of compensation normally allowed by traditional courts.

The seduced woman may herself institute an action in terms of the common law. Where she is successful, compensation is determined in terms of common law principles. Where, however, her father had also instituted an action and was successful, the amount that her father obtained as compensation is taken into consideration in the determination of the compensation she is entitled to.

If the seduced woman had already instituted a successful claim in terms of the common law, however, her father or guardian may not thereafter institute an action in terms of customary law. If an unmarried woman is impregnated by a third person before marriage and her husband was not aware of it at the time of the marriage, the husband may institute the action for compensation. Where the claim has already been instituted, the husband may proceed with it.

4.8.3 Adultery

Any African committing adultery with a woman living with her husband is liable for damages. No action will lie, however, if the husband connives in the adultery, or if at the time of the alleged adultery the woman and her husband were not living together as man and wife.

Adultery in customary law is committed with a married woman. Unlike the common law, it is also committed with a widow by a man other than her *ukungena* partner. The person who institutes the action for compensation is the husband. It would appear that as a result of the equality of the spouses in a customary marriage, the wife is also entitled to institute an action for compensation based on adultery with her husband. But this is a moot point as a husband in a customary law marriage may enter into a customary marriage with another woman.

4.8.4 Ukuthwala

The custom of *ukuthwala* is discussed in detail in study unit 10. It is still important to mention this custom in this study unit in as far as it gives rise to delictual liability.

Ukuthwala is a custom whereby a girl is removed from her family home to the home of the man's father in an attempt to initiate marriage negotiations. However, *ukuthwala* can give rise to delictual liability if:

- a marriage offer is not made;
- the man's family is not in a position to pay the required *lobolo*
- the girl's guardian does not consent to the marriage with the man concerned.

(Rautenbach and Bekker (eds) *Introduction to Legal Pluralism* (2014) 165-166).

4.8.5 Damage to property

4.8.5.1 Animals

Originally any property damaged by an animal had to be replaced. Nowadays compensation will probably sound in money. Owners must be compensated for damage to crops, unless the owner had been contributory negligent by, for instance, not taking precautions against trespass by animals.

Where an animal injures or kills another person's animal, the owner of the animal must be compensated. The owner of the wayward animal must however, be shown to have known that his animal is vicious and failed to keep it away from other animals.

4.8.5.2 Human beings

Anybody who causes damage to another person's property may be held liable. The perpetrator must have caused the damage intentionally or negligently; for instance setting a field on fire or negligently caused a fire to start or spread.

If herd boys intentionally injure animals they may be held liable with their father, guardian or family head. As in the case with other delicts material evidence, such as the damaged article, is important for founding a claim. Such proof may even be taken from the culprit, if needs be by force.

4.8.6 Negligent causation of the death of breadwinner

Before 1963 South African courts did not recognise a customary marriage as a basis for the dependant's action. A widow of a customary marriage could not succeed in an action for loss of support where her husband was negligently killed as it was held that there was no cause of action.

The courts established to adjudicate cases between blacks had no jurisdiction if one of the parties was a non-black and the "ordinary" courts did not recognise customary marriages.

This turned into a serious issue in which widows of customary marriages claimed compensation in terms of the Road Accident Fund Act. Section 17(1) of that Act which provides that:

"The fund or agent shall-

- a) Subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner of the driver thereof has been established;
- b) Subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee."

The legislature therefore had to intervene by passing section 31 of the Black Laws Amendment Act. The purpose of this legislation was to grant widows of customary marriages the right to sue for damages for loss of support as a result of the death of their breadwinners / husbands. Such widows had, however to produce a certificate which proves that they were married by custom and that such marriage was existing at the time of death. The certificate was regarded as *prima facie* proof of its contents. It had to be produced by the plaintiff when existence of the marriage was in dispute at any time of the trial.

The existence of a customary marriage could, however, also be proved by other forms of evidence, for example, by means of an affidavit.

Section 31 (5) of the Black Law Amendment Act, however, still serves a purpose:

"If a deceased partner to a customary union is survived by more than one partner of such a union, the aggregate of the amount of the damages to be awarded to such partners shall under no circumstances exceed the amount which would have been awarded had the deceased partner been survived by only one partner to a customary union."

Customary marriages are now recognised on the same footing as civil marriages. Therefore spouses to customary marriages are regarded as validly married. This means that a widow or widower of a customary marriage has as a spouse to a valid marriage, the same rights as a widow or widower of a civil marriage. He or she is therefore legally a dependant of his or her spouse. Section 31 of the Black Laws Amendment Act of 1963 has, however, not been repealed. Was it an oversight on the part of the legislature?

It would appear that section 31 still applies in so far as it is not inconsistent with the provisions of the Recognition of Customary Marriages Act of 1998. This means that it can still be used to prove the existence of a customary marriage whenever such existence is in dispute.

4.8.7 Disobedience to traditional authority

This falls within the domain of public law rather than private law of delict. It is nevertheless dealt with here to make the point that disobedience to a kgosi is a wrongful act.

Traditionally, and that is true to this day, a senior traditional leader had the standing as described by Schapera.

“The chief was always treated with great respect. He was ceremonially addressed by the personification of the tribal name (e.g. as MoNgwato or MoKgatlā), and his deeds were extolled in special praise-poems (mabôkô) recited at important assemblies. His installation and marriage were occasions of great public festivity, and his death universally mourned. He received tribute from all his subjects, in both labour and kind; he had the first choice of land for his home, fields and cattle-posts; he and his family were leaders of the age-regiments, and took precedence in matters of ritual; and he alone had the right to convene tribal assemblies, create new regiments, arrange tribal ceremonies, and impose the supreme penalties of death and banishment. Offences against him personally were usually punished more severely than if committed against other members of the community and disloyalty or revolt against his authority often met with death and the confiscation of the culprit's property. If his own conduct was unsatisfactory, he could be warned or reprimanded by his advisers or at public assemblies. If he ruled despotically or repeatedly neglected his duties, the people would begin to desert him, or more popular relative would try to oust him by force, or, in the last resort, he might even be assassinated (as happened, for instance to the Kwenā chief Motswasele II in 1821).” (Handbook of Tswana law and custom (1984) 89)

Imposition of the death penalty and confiscation of a culprit's property are of course no longer allowed, but the remainder is a fairly true portrayal of the kgosi's status among the older generation. However, the Kgosi is also challenged, especially by youth or community groups that contest his powers, but older men then tend to reprimand the challengers with reference to customs. Although youth could challenge the Kgosi, it is generally accepted that youth should do this in a courteous manner.

It is interesting to note that wayward subjects could be banished. It was termed giving a person a *trekpas* (notification ordering someone to leave the area.) There is no evidence that a senior traditional leader's council may not terminate the membership of a recalcitrant, member of the community. In this regard Prinsloo comments:

The Customary Administration Law of a Northern-Sotho tribe (1981) wrote: “The informant accepts that the senior traditional leader in collaboration with the tribal council has the authority to deprive a member of the tribe of his membership – irrespective, whether he has acquired his membership through birth or immigration – if such a member rejects the authority of the chief and his councils. The informants, however, did not remember an example of someone whose tribal membership has been unilaterally ended through a notification by the chief to leave the tribal area. The departure from the tribal area by some previous inhabitants was not viewed as an example of tribal members whose membership had been ended by the chief, but rather as an indication that indeed such action would fall within the competence of the chief.” (Die inheemse administratief reg van n Noord-Sotho stam, (1981))

Maithufi (1985:147) explains that “A *trekpas* may be issued for various reasons. It may be issued on the grounds that the tribal members had defied the authority of the chief, promoted divisions in the tribe or organised and encouraged opposition to the recognised tribal control”. The courts have over and again held that *trekpas* is not against public policies and natural justice – in other words it is an acceptable feature of customary law. Section 10(1) (b) of the Traditional Courts Bill (2008) excluded

banishment from the traditional community from the list of sanctions that a traditional court could admonish.

Although the Bill has been withdrawn, it can be expected that a court of appeal will concur with such exclusion. Section 18 of the Bill of Rights determines that everyone has the right to freedom of association and section 21 provides that every person has the right to freedom of movement, which may lead to challenges to the punishment of banishment.

4.9 Self-assessment

Indicate whether the following statements are TRUE or FALSE:

1. A family head may be held liable for delicts committed by members of his family.
 - (a) **TRUE**
 - (b) **FALSE**
2. A woman who has been seduced may, in her own capacity, institute a claim for damages in terms of the common law.
 - (a) **TRUE**
 - (b) **FALSE**
3. In customary law, there is a clear distinction between law of delict and criminal law.
 - (a) **TRUE**
 - (b) **FALSE**
4. Customary marriages are now recognised on the same footing as civil marriages.
 - (a) **TRUE**
 - (b) **FALSE**
5. Section 6 of the Recognition of Customary Marriages Act provides that the wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any powers that she might have at customary law.
 - (a) **TRUE**
 - (b) **FALSE**

SOURCES REFERRED TO IN THIS STUDY UNIT

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STUDY UNIT 5

Traditional authority

5.1 Learning outcomes

After having studied this study unit, you should be able to:

- explain the scope and jurisdiction of the different courts.
- compare and contrast the functions of the different courts.
- discuss the function of traditional courts in terms of customary law.

5.2 Constitutional empowerment of the courts

Section 211 (3) of the Constitution of the Republic of South Africa 1996 provides that:

“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

As section 211 (3) of the Constitution provides that the courts **must** apply customary law when that law is applicable, section 1 (1) of the Law of Evidence Amendment Act has become obsolete. It provides that all courts **may** apply customary law.

In terms of the Constitution these courts are:

- the Constitutional Court;
- the Supreme Court of Appeal;
- the High Court;
- the Magistrate’s Court; and
- any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the high courts or the magistrate’s courts.

As the traditional authority courts are established by an Act of Parliament, namely the Black Administration Act, they remain intact.

Section 211 (1) and (2) of the Constitution moreover guarantees their continued existence as follows:

- “(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.**
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of that legislation or customs”.**

Section 16(1) of Schedule 6 of the Constitution provides in addition that –

“Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to:

- (a) any amendment or repeal of that legislation; and**
- (b) consistency with the new Constitution”.**

5.2.1 *Small claims courts*

Small claims courts are also courts established in terms of an Act of Parliament.

The Small Claims Courts Act does not provide for the application of customary law. It is not necessary because, as stated above, in terms of the Constitution all courts **must** apply customary law where it is applicable.

5.2.2 *Civil courts of senior traditional leaders*

5.2.2.1 **Authorisation**

In terms of section 12 (1) (a) of the Black Administration Act:

“The Minister may –

- (a) authorise any Black senior traditional leader or headman recognized or appointed under subsection (7) or (8) of section two to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within his or her area of jurisdiction;
- (b) at the request of any senior traditional leader upon whom jurisdiction has been conferred in terms of paragraph (a), authorise a deputy of such senior traditional leader to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within such senior traditional leader’s area of jurisdiction.

Provided that a senior traditional leader, headman or deputy senior traditional leader may not under this section or any other law have power to determine any question of nullity, divorce or separation arising out of a marriage”.

5.2.3 *Criminal courts of senior traditional leaders*

In terms of section 20 of the Black Administration Act

“The Minister may –

- (1) (a) by writing under his hand confer upon any senior traditional leader or headman jurisdiction to try and punish any Black who has committed, in the area under the control of the senior traditional leader or headman concerned-
 - i) any offence at common law or under Black law and custom other than an offence referred to in the Third Schedule to this Act; and
 - ii) any statutory offence other than an offence referred to in the Third Schedule to this Act, specified by the Minister;

(Serious offences, such as murder, are listed in the Third Schedule.)

Provided that if any such offence has been committed by two or more persons any of whom is not a Black, or in relation to a person who is not a Black or property belonging to any person who is not a Black other than property, movable or immovable, held in trust for a Black tribe or a community or aggregation of Blacks or a Black, such offence may not be tried by a Black chief or headman;

- (b) at the request of any senior traditional leader upon whom jurisdiction has been conferred in terms of paragraph (a), by writing under his hand confer upon a deputy of such senior traditional leader jurisdiction to try and punish any Black who has committed, in the area under the control of such senior traditional leader, any offence which may be tried by such senior traditional leader”.

5.2.4 *Magistrates' civil courts*

As courts of first instance, these courts may within their limits of jurisdiction hear any dispute arising out of customary law.

As courts of appeal in civil matters.

In terms of section 12(4) of the Black Administration Act –

“Any party to a suit in which a black chief, headman or chief's deputy has given judgment may appeal therefrom to any magistrate's court which would have had jurisdiction had the proceedings in the first instance been instituted in a magistrate's court, and if the appellant has noted his appeal in the manner and within the period prescribed by regulation under subsection (6), the execution of the judgment shall be suspended until the appeal has been decided (if it was prosecuted at the time and in the manner so prescribed) or until the expiration of the last mentioned period if the appeal was not prosecuted within the period, or until the appeal has been withdrawn or has lapsed: Provided that no such appeal shall lie in any case where the claim or the value of the matter in dispute is less than R10, unless the court to which the appellant proposes to appeal, has certified after summary enquiry that the issue involves an important principle of law.”

The magistrate's court may confirm, alter or set aside the judgment after hearing such evidence as may be tendered by the parties to the dispute, or as may be deemed desirable by the court. A confirmation, alteration or setting aside of a judgment is deemed to be a judgment of the magistrate's court for the purpose of execution of the judgment.

5.2.5 *Magistrates' courts as courts of appeal in criminal matters*

In terms of section 20(6) of the Black Administration Act –

“Any person who has been convicted by a senior traditional leader or senior traditional leader's deputy may in the manner and within the period prescribed by regulation made under subsection (9), appeal against the conviction and against any sentence which may have been imposed upon him, to the magistrate's court which has jurisdiction in the district in which the trial in question took place.”

Although this is an appeal it is virtually a trial *de novo*, except that the appellant is not called upon to plead to the charge.

5.2.6 *The High Courts*

The High Courts may obviously hear cases arising from customary law.

5.2.7 *The Constitutional Court*

The Constitutional Court may naturally be called upon to adjudicate on any constitutional issue emanating from the other courts.

5.3 **Procedure and evidence in traditional authority courts**

5.3.1 *Procedure*

Lawyers may not appear in the courts of traditional leaders. They may therefore think that they need not know anything about the procedure in these courts. Where there is, however, an appeal from the judgment of a traditional leader to the magistrate of the district concerned; in that event lawyers may handle the appeal. Clients may moreover need advice when summoned to appear before a traditional authority court. That necessitates knowledge of the procedure that led to the judgment against which an appeal is lodged.

The rules of procedure are unwritten. In terms of Rule 1 of the Traditional Leaders Court Rules as contained in Government Notice R2082 of 1967 the procedure in connection with the trial of civil disputes before a traditional leader under section 12 of the Black Administration Act of 1927 must be

in accordance with the recognised laws and customs of the community.

Section 10 of the Black Administration Act of 1927 provides that in criminal trials the procedure must be in accordance with African law and customs, save in so far as the Minister may prescribe otherwise by regulation. No such regulations have been made.

There is no distinction between the procedure in civil and criminal cases. A terminological distinction is, however, made between a plaintiff in a civil case and a complainant in a criminal case, as also between a defendant and an accused.

5.3.2 *Initiation of proceedings*

When a dispute arises between two persons, there will initially be an attempt to settle it at family level. The family heads of the family houses concerned would get together and discuss the matter. Many family disputes about succession and lobolo will come before the family court, known in Xhosa as *inkundla yemilowo* (meaning the court of close relations).

5.3.3 *The procedure*

When a case comes before a senior traditional leader, the plaintiff or complainant must state his or her case in the same detail as he stated it before the elders and the ward headman. The traditional leader is assisted by his councillors (Zulu ("*ibandla*")). Men and women of the neighbourhood are gathered for the trial.

The plaintiff or complainant is cross-examined by his or her opponent and by anybody present. The defendant or accused then states his/her defence and is cross-examined by his or her opponent and by anybody present. The defendant or accused then states his/her defence and is cross-examined in a like manner. The matter is then open for discussion and anyone can take part.

In civil matters, litigants may be agnatic groups going to court to resolve a conflict. Often family members would accompany and support a litigant, because ultimately they might have to satisfy a judgment.

Messengers might be sent to warn a defendant and witnesses to appear in court. If a material witness does not turn up, the case is postponed and messengers sent to warn the defendant. Absence might entail punishment for contempt of court.

In criminal cases proceedings are also instituted by an officer who introduces the matter for trial or by the presiding officer. Messengers or the officer referred to above must warn the accused, the complainant and witnesses to appear.

Failure to observe customary law procedure gives rise to an action for damages. The high courts are, however, reluctant to interfere with the procedure followed in a traditional authority court. The proceedings of such court will only be set aside when it is clear that the court has disregarded the traditional court procedure.

5.3.4 *The judgment*

The judgment is characterised by the principle "reconciliation". This was described by Gluckman as follows:

"Thus, when a case came to be argued before the judges, they conceived their tasks to be not only detecting who was wrong and who in the right, but also the readjustment of the generally disturbed social relationships, so that these might be saved and persist. They had to give judgement on the matter in dispute, but they had also, if possible to reconcile the parties while maintaining the general principles of law. It is in the process of achieving reconciliation, while abiding by the law, that ... we can see most clearly the doctrine of natural justice present in Africa." (Gluckman "Natural justice in Africa" (1964) *Natural Law Reform*, 25, quoted by Mqoke *Basic Approaches to Problem solving in Customary Law* (1977))

Practice differs among communities, but generally the unsuccessful party must pay the court fees. A portion of the fees, usually the largest, accrues to the traditional leaders, who are nowadays obliged to pay it into the community funds. The fees usually consist of livestock (nowadays money). Where the fee consisted of livestock, a goat was often slaughtered for consumption by the people who attended the hearing of the case.

5.3.5 Execution of judgment

The procedure to be followed in executing a judgement is that followed by the community over which the senior traditional leader has been appointed; in the case of a headman the laws and customs of the inhabitants of the ward. In most communities it is customary to send a community constable to levy execution. There is no provision for a sale in execution so that whatever is attached must be handed to the judgment creditor, i.e. the party in whose favour judgement was given.

5.3.6 Evidence

The following is a synopsis of traditional customary court procedure described by Bekker:

- Witnesses are not sworn in. The present author has, however, observed that nowadays witnesses are sworn in in the same manner as in the common law courts.
- Hearsay and irrelevant evidence are admissible.
- There are no definite rules of evidence. The courts are not bound by numerous rules as the common law courts are.
- A witness is allowed to tell his or her whole story and the smallest details are narrated.
- There is no definite order in which witnesses are called. The court may for instance, call a witness halfway through the plaintiff's or complainant's case, if it appears to be necessary to clarify a point.
- The accused has to prove his innocence. There is no onus on the complainant or prosecution to prove that the accused is guilty. This is similar to the rule in most continental countries.
- The court actively participates in the questioning of witnesses and may of its own accord call witnesses. The court may in fact obtain any evidence that it deems necessary. A person present at the hearing may offer evidence or question a witness.
- Concrete evidence is extremely important. Where redress is sought for seduction or adultery a garment or other article, such as a stick is often regarded as decisive evidence. This goes hand in hand with a so-called 'catch'. The textbook example is that of a husband catching an adulterer *in flagrante delicto*. He would seize an article of clothing or the like, such as a blanket or something left behind, as proof of his catch. The article so taken is called *ntlonze*. An article thus taken may be kept in anticipation of the ensuing action.
- In terms of the '*spoor law*' again the inmates of a homestead or village to which the tracks of stolen cattle are traced may be held liable for restitution unless they can prove that they have followed these tracks past their homes.
- An unreasonable delay in taking action may also be taken as evidence that the plaintiff or complainant does not have a sound claim.

5.3.7 Statutory departures from rules

As stated above, there are various statutory departures from these rules. They are contained in the Chiefs' Court Rules.

The regulations were promulgated under the Black Administration Act. These rules represent statutory modification of the traditional procedure. Although some of the former independent homelands enacted their own regulations, their rules were based on the rules promulgated in Government Notice No. R2092 of 1967. The Native Appeal Court decisions on the rules contained in the regulations that were superseded by the current regulations are still relevant as their contents are similar.

It is important to note that the African legal procedure is retained in most regulations and is to be found in the following proviso: "*Procedure to accord with recognised customs and laws.*"

The procedure in connection with the trial of civil claims between Blacks before a traditional leader or headman under section 12 of the Act, must be in accordance with the recognised customs and laws of the communities. This provision is similar in most regulations governing the functioning of the customary courts in South Africa.

5.3.7.1 Hearing or judgment in the absence of parties (Rule 2)

- If there is no appearance by or on behalf of the defendant at the date and place fixed for the hearing of the action, the traditional leader may upon the request of the plaintiff and on being satisfied that notice of the action was given to the defendant personally and that the defendant was at the time of receipt of such notice within the area of the traditional leader, give judgment in favour of such plaintiff for an amount, or such other relief not exceeding the amount or relief claimed by the plaintiff and costs of the action.
- Every rescission of a default judgement must be reported verbally or in writing, personally or by messenger, by the traditional leader who rescinded such judgement to the clerk of the court who must record the rescission in the 'remarks' column of the register referred to in rule 7 opposite the particulars of the case in question.

In practice, traditional leaders would seldom, if ever, try a case in the absence of one of the parties.

5.3.7.2 Traditional leader to have no interest in case (Rule 4)

No traditional leader may adjudicate upon any matter or thing in which he is pecuniary or personally interested.

In practice, again, this rule cannot be applied literally. The courts are community courts and the traditional leader and his councillors are members of the community.

5.3.7.3 No legal practitioner (Rule 5)

Notwithstanding anything in any other law contained no advocate or other legal practitioner may appear or act for any party in any traditional leader's court.

5.3.7.4 Written record (Rule 6)

Immediately after pronouncement of judgement (including a default judgement) the traditional leader must prepare or cause to be prepared a written record in quadruplicate, containing the following particulars:

- Name of plaintiff
- Name of defendant
- Particulars of claim
- Particulars of defence
- Judgment
- Date of judgment

5.3.7.5 Registration of judgments (Rule 7)

- All judgments (including default judgments) of a traditional leader's court must be registered and the particulars of the written record referred to in rule 6(1), together with dates of registration must be entered in a register to be kept for the purpose by the clerk of the court.
- If after two months the written record has not been delivered to the magistrate as provided in rule 6(3) or (4) the judgement lapses.

A party who wants to lodge an appeal is supposed to use this registration as point of departure.

5.3.7.6 Execution (Rule 9)

- The procedure in connection with the execution of a traditional leader's judgment must be in accordance with the recognised customs and laws of the community:
- Any claim made by any person other than the judgment debtor, must be heard and determined by the traditional leader who delivered the judgment resulting in such attachment or by his successor in office.

5.3.7.7 Appeal against senior traditional leader's judgement (Rule 9)

Any party dissatisfied with any judgment or order of a traditional leader's court may within two months from the date of the pronouncement thereof, appeal against such judgment or order to the court of the magistrate having jurisdiction by notifying the clerk of the said court either in person or through a legal representative: Provided that no appeal lies from a default judgment given by a traditional leader unless and until an application for the rescission of such judgment has been refused.

As soon as the appellant has notified the clerk of the court in terms of sub rule (1) and has deposited with the clerk of the court the fees prescribed in rule 13 (2)(d) and (e), the appeal shall be deemed to have been properly noted provided that if the judgment subsequently lapses as provided in rule 7 (2) the appeal also lapses.

The magistrate may on good cause shown extend the period prescribed in sub rule (1) for noting an appeal.

5.3.7.8 Senior traditional leaders' reasons for judgement (Rule 11)

The traditional leader must as soon as possible but not later than fourteen days after receiving the notification referred to in rule 10 (1)(d), furnish the clerk of the court personally or by deputy with the reasons for his judgement, which if not in writing, shall be recorded by the clerk of the court and must form a part of the record of the case. When the reasons for judgement have been furnished, the clerk of the court must pay over to the traditional leader the fees deposited with him under rule 9(2).

5.3.7.9 Hearing of appeal (Rule 12)

- The plaintiff in the traditional leader's court may not less than seven days before the date fixed for the hearing of the appeal, file with the clerk of the court and serve upon the defendant, a written statement amplifying his claim in the traditional leader's court.
- The defendant in the traditional leader's court may not less than seven days before the date for hearing of the appeal, file with the clerk of the court and serve upon the plaintiff a written statement of his defence to the claim and may also raise a counterclaim notwithstanding that such claim was not raised in the traditional leader's court.
- The court of the magistrate may at or before the hearing of the appeal allow the statement of claim, defence or counterclaim referred to in sub-rule (1) and (2) to be then and there recorded notwithstanding that the same may not have been submitted within the time herein before mentioned and must require the plaintiff to plead to the counterclaim.
- Upon the day fixed for the parties the court of the magistrate must proceed to re-hear and re-try the case as if it were one of first instance in that court and may give such judgment or make such order thereon as provided in section 12(5) of the Act. The successful party may take out the process of the court of such magistrate for the execution of such judgment or order.
- The clerk of the court must immediately after the appeal has been heard issue a notice to the traditional leader against whose judgment the appeal was lodged, informing him of the result of such appeal and in the case of the noting of any further appeal to the appeal court of such appeal, and in due course of the outcome thereof.

5.3.7.10 Reform of traditional authority courts

A Traditional Courts Bill [BI – 2012] was tabled in Parliament during 2013 but was withdrawn. Although students should take note of it, it is as yet not of practical value for the present course. If the Bill becomes law it will give those courts a new lease of life. But even in their present shape they are actively engaged in resolving disputes at community level. The members of the community accept them and appreciate the unique manner in which they settle disputes.

5.4 Self-assessment

Indicate whether the following statements are **TRUE** or **FALSE**:

1. The Constitution provides that courts must apply customary law when that law is applicable, subject to the provisions of the Constitution and any legislation that specifically deals with customary law.
(a) **TRUE**
(b) **FALSE**
2. Hearsay and irrelevant evidence are admissible in the traditional leader's court.
(a) **TRUE**
(b) **FALSE**
3. In customary law the traditional leader's judgment is characterised by the principle of reconciliation.
(a) **TRUE**
(b) **FALSE**
4. It is common practice for traditional leaders try a case in the absence of one of the parties.
(a) **TRUE**
(b) **FALSE**
5. In terms of customary law the onus is on the complainant to prove that the accused is guilty.
(a) **TRUE**
(b) **FALSE**

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STUDY UNIT 6

Succession and inheritance

6.1 Learning outcomes

After having studied this study unit, you should be able to

- explain how estates of Black people were administered prior to the current constitutional dispensation.
- provide an analysis of the legal reforms that took place regarding the administration of estates.
- understand the significance of case law in reforming the system of administration of systems.

6.2 Distinction between succession and inheritance

In customary law a distinction is made between inheritance and succession.

Inheritance is mainly concerned with the division of the assets of a deceased person among his or her heirs. The division can take place according to the provisions of a will or according to the rules of common law where there is no will, thus intestate inheritance. The liabilities of the deceased are first set off against the assets, and the balance is then divided among the heirs. Should the liabilities exceed the assets, the heirs inherit nothing.

In the case of succession, there is, strictly speaking, no division of property. The successor takes the place of the deceased and gains control over the property and the people over which the deceased had control. Furthermore, the successor succeeds not only the assets of the estate, but also its liabilities. Should the liabilities exceed the assets, the successor, in customary law, succeeds to these as well. Please note that this position is not the same for all groups.

6.3 Conflict between customary law and common law

South Africa had in the past recognised two different systems of succession: the common law (together with the statutes amending it) and customary law. Many of the customary law rules previously used were not only in conflict with the principle of equal treatment, but totally unconstitutional.

The debate concerning the conflict between culture and equality has been widely debated in case law especially in the last few years.

A concrete example of the conflict surfaced is the first case of *Mthembu v Letsela*, as well as the second *Mthembu case (Mthembu v Letsela)* which went on appeal. Ultimately, as discussed below, the discriminatory statutory and customary law rules were declared unconstitutional and new legislation promulgated.

6.4 Administration of estates prior to 5 December 2002

Section 23 of the Black Administration Act provided that where a black person died testate, such estate had to be administered by the Master of the High Court.

However, should a black person have died, leaving no valid will, the intestate estate had to be administered by the magistrate in whose jurisdiction such black person resided. The Regulations for the Administration and Distribution of the Estates of Deceased Blacks, was utilized to assist in the administration of black intestate estates, but was not adequate.

6.4.1 *Effect of the case of Moseneke and Others v The Master and Another: Administration of estates by Master or magistrate 2002 to 2004*

The result of this decision was that an intestate black estate could be reported to the

Master to be administered in terms of the common law or at the magistrate's office to be administered by the magistrate in terms of customary law. This was the prerogative of the person reporting the estate. Where the estate was administered by the magistrate, the informal procedure of GN R200 of 1987, referred to above, was followed. On the other hand, where the estate was reported to the Master, the common law was applied to administer the estate.

The above practice was allowed to be applied for only two years as from the decision taken originally in the *Moseneke* case. The Department of Justice had to bring about legislation regulating the administration of all estates in the Republic of South Africa. But alas no regulating legislation was forthcoming. The existing apartheid legislation was merely amended.

6.5 Position with effect from 6 December 2001 to 15 October 2004

6.5.1 *Testate succession*

As alluded to in the *Moseneke* decision, the provisions of section 23(2) of the Black Administration Act, were allowed to be followed for only two years. The two year period came to an end on 5 December 2002. From 6 December 2002, the Master of the High Court was empowered to deal with all estates governed by the common law. Should a person have died and the value of the estate was below R125 000, such estate was dealt with at service points at the magistrates' offices on behalf of and under the direction of the Master. These estates are not restricted to the estates of only black persons.

All testate estates in excess of R125 000 still had to be reported at the Masters of the High Court for administration.

6.5.2 *Intestate succession*

6.5.2.1 Responsibility of the Master

As from 6 December 2002 up until 15 October 2004 the responsibility to supervise the administration of the following estates was taken away from the magistrates and could be dealt with only by the Master in terms of the Administration of Estates Act:

- The estate of a black person, who during his lifetime, applied for an exemption from the application of the Code of Zulu Law.
- The estate of a black person who is not a resident of South Africa (foreigner).
- The estate of a black person who, at the date of his death was a partner in a civil marriage.
- The deceased, who at the date of his death, was a widow, widower or divorced person from a civil marriage and is not survived by a partner to a customary marriage concluded subsequent to the dissolution of the marriage.
- When the Minister of Justice directs that the estate must be administered in terms of the common law.

Before a Master could administer the estate referred to above, documentary proof had to be submitted that the estate is one of the aforesaid estates.

6.5.2.2 Responsibility of the Magistrate

Where a black person died intestate the magistrate in the area of jurisdiction where the deceased last resided still had the power to administer the estate of:

- Any person who was a partner to a customary marriage; and
- Any unmarried person.

The above estates were still distributed under customary law as provided for under the Black Administration Act and the regulations promulgated thereunder.

NOTE: The foregoing may be summarised as follows:

Testate estates had all along to be administered by the Master of the High Court.

Intestate estates:

- Prior to 5 December 2002 – Administered by magistrates, in terms of customary law.
- Administered by magistrates from 6 December 2002 to 15 October 2004. Administered by Masters or magistrates in terms of the common law.
- 5 October 2004 to date – Master's office, retrospective to 27 April 1994, except in the case of completed transfers.

6.6 Position from 16 October 2004 to date – Discrimination declared unconstitutional

Everything that has been discussed in paragraphs 1 to 3 above has now been changed by the case of *Bhe and Others v The Magistrate, Khayelitsha and Others*.

The said case was an application for confirmation of an order of constitutional invalidity made by the Cape High Court. The Court found section 23(10)(a), (c) and (e) of the Black Administration Act and regulation 2(e) of the Regulations for the Administration and Distribution of Estates of Deceased Blacks unconstitutional and invalid. Section 1(4)(b) of the Intestate Succession Act was also declared to be unconstitutional in so far as it is excluded from the application of section 1 of that Act any estate or part of any estate in respect of which section 23 of the Black Administration Act applies.

Langa DCJ, writing the majority judgment, held that, construed in the light of its history and context, section 23 of the Black Administration Act was an anachronistic piece of legislation which ossified “official” customary law and caused egregious violations of the rights of black African persons. The section created a parallel system of succession for black Africans, without sensitivity to their wishes and circumstances. Section 23 and its regulations are manifestly discriminatory and in breach of the rights to equality in terms of section 9(3) and dignity in terms of section 10 of the Constitution of the Republic of South 1996, and therefore must be struck down.

The effect of this order was that not only were the substantive rules governing inheritance provided in the section held to be inconsistent with the Constitution, but also the procedures whereby the estates of black persons were treated different from the estates of white persons were held to be inconsistent with the Constitution.

Langa, DCJ also considered the African customary law rule of male primogeniture (the extensive rights of the first-born son to inherit), in the form that it has come to be applied in relation to the inheritance of property. He held that it discriminated unfairly against women and extra-marital children. He accordingly declared it to be unconstitutional and invalid.

He held that while it would ordinarily be desirable for courts to develop new rules of African customary law to reflect the living customary law and bring customary law in line with the Constitution, that remedy is not feasible in this matter, given the fact that the rule of male primogeniture is fundamental to customary law and not replaceable on a case by case basis. However, he held that an interim regime to regulate interstate succession of black persons was necessary until the legislature was able to provide a lasting solution.

As such, the Court ordered that estates that would previously have devolved according to the rules in the Black Administration Act and the customary law rule of male primogeniture must devolve in terms of the rules provided in the Intestate Succession Act. Special provision was made in the order for polygamous customary marriages.

The order of this Court in respect of the rules of inheritance was made retrospective to 27 April 1994, but would not apply to completed transfers of ownership, except where an heir had notice of a challenge to the legal validity of the statutory provisions and the customary law rule of male primogeniture.

In relation to the administration of estates, the Court ordered that in future deceased estates

which would previously have been administered by magistrates in terms of the Black Administration Act must now be administered by the Master of the High Court in terms of the Administration of Estates Act. However, the order of the court in respect of the administration of estates was not made retrospective, so estates at that time being administered by magistrates in terms of section 23 of the Black Administration Act would continue to be administered by those magistrates. From the date of this judgment, new estates had to be administered by the Master of the High Court in terms of the Administration of Estates Act.

In summary it is concluded that:

- Section 23 of the Black Administration Act, is repealed with retrospective effect to the 27 April 1994.
- Magistrates will no longer have the authority to administer black intestate estates.
- All estates, irrespective of race, colour or creed will be administered by the Master of the High Court in terms of the Administration of Estates Act.
- The order of the court in respect of the administration of estates was not made retrospective, thus estates at that time being administered by the magistrates in terms of section 23 of the Black Administration Act, could continue to be administered by those magistrates. However, the customary rules of intestate succession would not be adhered to and the magistrate would have to apply the provisions of the Intestate Succession Act.
- Although, the provisions of section 23 have been repealed with retrospective effect, it will not apply to completed transfers of ownership, except where an heir had notice of a challenge to the legal validity of the statutory provisions and the customary law rule of male primogeniture. How the challenge will be put into effect is for the courts to decide and only the future will tell.
- In polygynous marriages, each spouse would be entitled to R125 000 or a child's share.

6.7 Effect of the Bhe-decision on the Deeds Office practice and procedure

6.7.1 Deceased died prior to 27 April 1994

Where a deceased died prior to 27 April 1994, his/her estate would have been wound up in terms of the Black Administration Act, and the regulations promulgated thereunder.

Practitioners preparing deeds and documents for lodgment in a deeds registry must follow the following practice:

6.7.1.1 Drafting of the *causa*

The *causa* of the deed will reflect who is entitled to receive transfer of the land in question as referred to in the regulation 4(2) certificate issued by the magistrate concerned, or if the provisions of the Intestate Succession Act were utilized, the conventional *causa*, as per the discussion *infra* must be applied.

Where the estate was administered in terms of the Black Administration Act, the *causa* should read as follows:

“And the appearer declared that the said deceased died intestate on

And whereas the estate is being administered in terms of the regulations promulgated in terms of Act 38 of 1927, in terms of which the herein mentioned transferee is entitled to the herein mentioned property in terms of the approval of the magistrate issued in terms of regulation 4(2) of Act 38 of 1927.

Now therefore”

Where the property is an asset in a joint estate, the *causa* will obviously have to reflect that if the surviving spouse is receiving the whole of the property, that he/she is entitled to a half share by virtue of his/her marriage in community of property to the deceased.

6.7.1.2 Deeds Office requirements for estates administered in terms of the Black Administration Act

- (i) The regulation 4(2) certificate by the magistrate must be lodged, or endorsed on the power of attorney.
- (ii) No proof of intestacy or intestate heirs need be lodged.
- (iii) The balance for distribution need not be proved.
- (iv) Any open bonds must be lodged for disposal.
- (v) If the property forms an asset in a joint estate, and the surviving spouse is entitled to the land as a whole, the provisions of section 45 of the Deeds Registries Act could possibly be used.
- (vi) The appointment of the representative need not be lodged, as the preparer accepts responsibility for such appointment (see the definition of executor read with regulation 44A(c) 16 in the Deeds Registries Act 47 of 1937).
- (vii) Proof that the deceased was not registered for Value Added Tax must also be lodged. However, if it is a leasehold being transferred no proof need be lodged.

6.7.2 Deceased died after 27 April 1994 but before 15 October 2004

Where the estate was wound up in terms of the Black Administration Act, the procedure as referred to in paragraph 6.7.1 *supra* will be followed:

Where the estate was reported to the magistrate, but the magistrate applied the provisions of the Intestate Succession Act, read in conjunction with the Administration of Estates Act, the procedure in clause 6.7.3 *infra* will have to be followed.

6.7.3 Where the deceased died after 15 October 2004

The relevant provisions of the Administration of Estates Act apply in the same manner as in other estates.

6.8 The reform of the Customary Law of Succession Act 11 of 2009

The Act was assented to on 19 April 2009 and came into operation on 20 September 2010. The main aim of the Act is to modify the customary law of succession so as to provide for the devolution of certain property in terms of the common law of intestate succession.

Note that according to the preamble the object of the Act is to modify the customary law of Succession so as to provide for the devolution of certain property in terms of the law of intestate succession and the law of property in relation to persons subject to customary law. "Modify" basically means "to change in form or character, usually without fundamental transformation". In fact the Act has replaced the customary law of succession entirely replacing it with the rules of succession in terms of the Intestate Succession Act. It would therefore serve no purpose to deal with the customary law of succession.

6.8.1 Spouses and children

The estate of a person who is subject to customary law, defined as the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people, who dies after 20 September 2010, without having a valid will, will devolve in terms of the Intestate Succession Act, subject to the following:

"where the deceased is survived by a spouse, as well as a descendant, including a spouse in a valid customary marriage, such a spouse must inherit a child's portion of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the cabinet member responsible for the administration of justice (presently R125 000) whichever is the greater".

Descendant is defined in section 1 as:

“a person who is a descendant in terms of the Intestate Succession Act, and includes:

- (a) a person who is not a descendant in terms of the Intestate Succession Act, but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her child.”**

Section 1(4)(e) and (5) of the Intestate Succession Act places “adopted children” of a deceased in the same position as other children for purposes of intestate succession. The adopted children in question are undoubtedly those contemplated in section 228 of the Children’s Act in terms of which:

“The child is adopted if the child has been placed in the permanent care of a person in terms of a court order...”

It is important to note that customary law does provide for the adoption of a child.

A woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse’s house (also known as a seed-raiser), must, if she survives him, be regarded as a descendant of the deceased.

The custom of seed-raising is discussed below.

6.8.2 The marrying of seed-raisers

To appreciate the necessity for this provision one must know that a house is not a mere dwelling. It is also said to be the family, property, rights and status which arise out of the customary marriage of a woman. If a man marries more than one woman they would rank (acquire a status) in the order or seniority. In respect of commoners, the first-married would constitute the great house, the second the right hand house and the third the left hand house. This is the general picture. There may be variations. A senior traditional leader may, for instance have a woman subsequently married as great wife.

Generally a man may marry as many wives as he pleases thus creating further houses, but the status and ranking of a house is an accomplished fact. But the wife of a house is expected to bear children, particularly a male heir. Hence a man may marry a seed-raiser in a house where the wife cannot bear children. He may also marry a seed-raiser where the wife has absconded or died without issue. It is however important to note that seed-raisers do not create separate houses.

The Sotho-Tswana call this woman a *seyanthlo* wife. She is married for the purpose of bearing children where the major wife is barren, has died or been divorced without bearing children or leaving young children in need of care.

6.8.3 Women to women marriages

This is a practice that may be found all over Africa, but incidents are rare. This occurs traditionally where a widow marries another woman or women to raise an heir for her late husband or even to procreate more children. In South Africa one may come across these marriages in Venda. In other communities they are few and far between.

A single woman may also with her own property in accordance with the usual rituals and customs, such as *lobolo*, enter into a customary marriage. The woman thus married becomes her wife and she selects a consort, usually a close relative, to *ngena* this woman and children born from this relationship belong to her house.

Researchers emphasise that this is not a homosexual relationship, but a traditional relationship between two families. If the deceased has no heir, the male issue of such relationship may inherit the deceased’s property.

Section 2 (2)(c) of the Act provides that:

“if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased’s house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.”

The South African Law Reform Commission would probably have to re-consider the rights of inheritance of children from such union. As it is a child born from such union would be entitled to inherit from his/her biological father.

6.8.4 Property acquired and held by traditional leader in official capacity

In terms of section 6 of the Act:

“Nothing in this Act is to be construed as amending any rule of customary law which regulates the disposal of the property which a traditional leader who has died held in his or her official capacity on behalf of a traditional community referred to in the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).”

When a traditional leader dies, the inheritance of his property and succession to his office are two different things.

Hartman explains:

“[W]hen the head of a household dies, his status, like that of a chief or a lineage head, passes to a successor. But in this case there are other matters to be settled as well, namely the control over the goods in his estate, and the question of who is to inherit them. This combination of inheritance and succession therefore warrants separate discussion, since it involves factors which are not present when one considers the succession to public status, as in the case of chieftainship, or lineage status, as in the case of lineage head. One must remember, however, that a chief and a lineage head are also heads of households. When they die therefore, their possessions are inherited on the same pattern (taking into account the exceptions mentioned above) as those of an ordinary head of a household. ” (Aspects of Tsonga Law (1991) 157)

The situation of some traditional leaders is *sui generis*. Queen Modjadji, for instance, does not fit into any pre-ordained set of statutory rules of succession. She is not supposed to be married and she marries, it is said, numerous women who bear children that belong to her. Combining succession to her personal property and the rights of inheritance of her children in an intestate succession would be an impossible task.

Succession to the assets of a traditional leader must not be confused with succession to the office of traditional leader in terms of the Traditional Leadership and Governance Framework Act.

6.8.5 Dispute or uncertainty in consequence of nature of customary law

In terms of section 5(1) and (2) of the Act:

“(1) If any dispute or uncertainty arises in connection with –

- (a) the status or any claim by any person in relation to a person whose estate or part thereof must, in terms of this Act, devolve in terms of the Intestate Succession Act;
- (b) the nature or content of any asset in such estate; or
- (c) the devolution of family property involved in such estate,

the Master of the High Court having jurisdiction under the Administration of Estates Act, 1965 (Act No. 66 of 1965), may, subject to subsection (2), make such a determination as may be just and equitable in order to resolve the dispute or remove the uncertainty.

- (2) Before making a determination under subsection (1), the Master may direct that an inquiry into the matter be held by a magistrate or a traditional leader in the area in which the Master has jurisdiction”.

Further details of the procedure are not necessary for present purposes. However, magistrates have no rules or guidelines by which they can make such determination at present.

6.8.6 Determination of a child's share

When determining a child's portion for the purposes of dividing the estate of a deceased in terms of the Intestate Succession Act, a child's portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived the deceased or have died before the deceased, but are survived by their descendants, plus the number of spouses and women referred to in section 2(2), (a), (b) and (c) of the Act.

6.8.7 Discarded wife

Until 2 December 1988 a man married by customary law could enter into a civil marriage with another woman, thereby dissolving the customary marriage. The wife to the dissolved customary marriage became known as the “discarded wife”. The “discarded” customary wife's rights are now preserved and inherits equally with the other wife.

6.8.8 Freedom of testation

Property allotted or accruing to a woman or her house under customary law by virtue of her customary marriage may be disposed of in terms of a will of such a woman.

6.8.9 Proof of heirs

The following two resolutions taken at the annual conference of Registrars provide guidance as to the proof required to determine the wives and descendants as per the Act:

“RCR 44 of 2009: Proof of heirs

What proof must a registrar of deeds insist upon to prove a descendant as defined in section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act No. 11 of 2009 (i.e. a person not being a descendant of the deceased, but was accepted by the deceased person as his or her own child)?

Resolution:

An affidavit of next of kin, certified as a true copy by the Master, which makes reference to such “descendant”.

RCR 45 of 2009: Proof of “Discarded wife”

A “discarded wife” is deemed to be a surviving spouse for purposes of intestate succession. However, as such marriage was never registered, what documentation must a registrar of deeds insist upon as proof that such “spouse” can inherit in terms of Act No. 81 of 1987, read with Act No. 11 of 2009.

Resolution:

An affidavit of next of kin, certified as a true copy by the Master, disclosing such discarded wife.”

6.9 Self-assessment

Indicate whether the following statements are **TRUE** or **FALSE**:

1. The effect of the decision taken in the *Moseneke* case was that between 2002 and 2004, an intestate estate of a Black person reported to the magistrate's office was to be administered by the magistrate in terms of the common Law.
 - (a) **TRUE**
 - (b) **FALSE**
2. Prior to 5 December 2002, Magistrates had no authority to administer intestate estates for Blacks.
 - (a) **TRUE**
 - (b) **FALSE**
3. From 6 December 2002 to 15 October 2004 all estates valued at R50 000 were reported to the Master of the High Court for administration.
 - (a) **TRUE**
 - (b) **FALSE**
4. In terms of the Intestate Succession Act adopted children of the deceased cannot inherit from him in terms of intestate succession.
 - (a) **TRUE**
 - (b) **FALSE**
5. In customary law, the role of a seed-raiser is to create her own separate house.
 - (a) **TRUE**
 - (b) **FALSE**

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STUDY UNIT 7

Traditional leadership and governance

7.1 Learning outcomes

After having studied this study unit, you should be able to:

- explain the function(s) of traditional leaders in South Africa.
- discuss the various structures of traditional leadership.
- describe the features of the transformed traditional leadership system.

7.2 Features of modern and traditional government

In the social sciences *tradition* is often contrasted with *modernity*, particularly in terms of whole societies. Tradition-oriented societies have been characterised as valuing among other things, group welfare, stability, and interdependence, while a society exhibiting modernity would value “individualism (with free will and choice), mobility, and progress.” Tradition is seen as something bound to ritual, where ritual guarantees the continuation of tradition.

Moreover a distinction can be made between traditional and modern governments when considering the manner of choice of leadership. Whereas modern governments imply democratic elections of those in leadership positions, in traditional systems leadership is based on historical and cultural inheritance of those positions. In other words, traditional authorities are perceived as chiefs or kings who have inherited their title from their fathers and will pass them on to their sons. The hereditary leadership then was based on the principle of primogeniture. Moreover, hereditary leadership implies that the leader holds the position for life in contrast to the fixed term of office of elected leaders in a modern democratic state.

7.3 Notion of tradition

The concept of ‘tradition’ has different meaning and connotations attached to it. Sometimes the term and its derivations can be conflicting and ambiguous.

There is no indication in the Constitution as to the meaning that should be attached to the term. Section 212(2) refers to a traditional authority ‘that observes a system of indigenous law’. This implies that traditional leadership refers to a cultural institution which has been handed down from generation to generation.

The Traditional Leadership and Governance Framework Act 41 of 2003 refers to ‘traditional leadership’ as the ‘customary institutions or structures as recognised, utilised or practiced by traditional communities’. The nature of the customary institutions, structures and procedures are determined by the different traditional communities.

7.4 Transformation of the institution of traditional leadership

The Institution of traditional government has over a long period undergone different stages of transformation. Actually, when accessing the development and change over time, three distinct phases may be separated, namely the pre-colonial, colonial, the new constitutional dispensation. The recognition given to traditional leaders has thus varied depending on the era.

7.4.1 Pre-Union

The various pre-Union (1910) British Colonial and Republican governments recognised senior traditional leaders in one form or another.

7.4.2 Black Administration Act 38 of 1927

In 1927 the position was consolidated in terms of the aforementioned Act by declaring the Governor-General (later State President) a supreme chief of all the 'Natives' in the Union of South Africa; by granting him wide powers to legislate in respect of 'Native affairs' by Proclamation; allowing him to appoint and dismiss traditional leaders; to assign powers and duties to them; and granting him powers to adjust community boundaries and remove 'natives', which he did from time to time.

7.4.3 The Black Authorities Act 68 of 1951

This Act created statutory community authorities, regional authorities and territorial authorities that constituted the building blocks for self-governing and independent states.

All these measures have been repealed, traditional leadership and governance being regulated by the Framework Act which will be referred to below.

7.4.4 Democratic Government

7.4.4.1 The Constitution

During the initial negotiations and drafting of the Constitution, the issue of the institution of traditional leadership proved to be a particularly problematic issue. Middle ground had to be found between the ancient institution and the new principles of equality, representation and constitutionality. Hence, the 1993 interim Constitution provided for limited recognition of traditional leadership and Houses of Traditional Leaders at both national and provincial level.

Chapter 12 of the South African Constitution (1996) specifically acknowledges the institution of traditional leadership and its place and role in the system of democratic governance. It provides for the continued authority and functioning of such leaders in accordance with traditional law, within the broader legal framework, and for traditional leaders to participate at local government level. Further the Constitution also established a Council of Traditional Leaders.

7.4.5 The Traditional Leadership and Governance Framework Act

After much delay, the South African Parliament finally passed two pieces of legislation in 2003 that aimed at giving the role of traditional leaders in South Africa greater clarity and substance. These were the Traditional Leadership and Governance Framework Act and an amendment to the Communal Land Rights Bill. However, they also made concessions to traditional authorities that, some may argue, effectively resuscitate the powers they enjoyed under the Bantu Authorities Act of 1951.

7.5 Traditional leadership and the South African Constitution

7.5.1 Institution of traditional leadership

The institution, status and role of traditional authorities are explicitly constitutionally recognised in two short sections.

Section 211 of the Constitution reads as follows:

- (1) The institution, status and role of traditional leaders, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority observing a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of the legislation and customs.

- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Section 212 further expounds the role of traditional leaders as follows:

- (1) National legislation may provide for a role of traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law:

National or provincial legislation may provide for the establishment of houses of traditional leaders; and National legislation may establish a council of traditional leaders. The various concepts and phrases in this section are not defined in the Constitution, but Rautenbach, Bekker and Goolam (Introduction to Legal Pluralism in South Africa (2014)) in referring to the Concise Oxford Dictionary and various other sources, conclude that:

- (a) An “institution” refers to “established law, custom or practice”;
- (b) The institutions’ activities are underpinned by values and ideas of the people recognizing the relevant institution;
- (c) Traditional leadership in this sense relates to the exercise of public authority over people to ensure orderly co-existence;
- (d) Three status positions may be distinguished, namely rulers and leaders, councillors and followers [communities] with each position having distinctive powers, duties and functions;
- (e) Traditional leaders are but one element of an institution.

7.5.1 *Implications of these recognition clauses*

The recognition of the institution of traditional leadership is further subject to two qualifications namely (1) the recognition must be in accordance with customary law and (2) subject to the Constitution. Customary law is not defined but section 211(2) of the Constitution refers to a system of customary law which includes amendments to or repeal of legislation relating to those customs. Over time customary law had been effected by legislation and court decisions and at present the institution of traditional leadership is governed by the Traditional Leadership and Governance Framework Act 41 of 2003 and the National House of Traditional Leaders Act 10 of 1997.

The second *proviso*, namely that the institution of traditional leadership is subject to the Constitution, indicates that the provisions of the Bill of Rights contained in Chapter 2 of the Constitution apply. In this regard the following sections of the Constitution are important:

- Section 8(1). The Bill of Rights applies to all laws (including customary law) and binds all organs of the state.
- Section 9. The equality clause which forbids unfair discrimination by the state or any person against anyone on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture language and birth. With regard to traditional leaders the following practices are implied, viz succession to office on grounds of gender (males only), primogeniture (firstborn) and exclusion on grounds of disability and illegitimacy (birth).
- Section 39(2). Courts in developing customary law must promote the spirit, purport and object of the Bill of Rights.
- Sections 40 and 41. These sections relate to co-operative government at all levels of government, and also between municipalities and traditional authorities on local level.
- Section 151. The local sphere of government is limited to municipalities, but this is in contradiction of section 211(2) of the Constitution which provides for the continued existence of traditional authorities at local level of government.
- Section 212. National legislation may make provision for a role for traditional leadership as an institution at local level on matters affecting local communities.

7.5.2 *Traditional leadership and issues of discrimination*

The qualification imposed on the constitutional recognition of customary law subjecting it to the Bill of rights has implications for traditional leadership and discrimination. Principles of customary law regulating traditional leadership must now be interpreted in the light of fundamental rights, particularly in the light of the equality clause as provided for under section 9. This section provides that:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

Most contemporary norms of customary law, particularly those relating to the regulation of traditional leadership institutions are often premised on discrimination, particularly on gender. This has created a potential conflict to equally opposing principles protected in the Constitution, recognising customary law on the one hand and prohibiting discrimination on the other. The case of *Shilubana v Nwamitwa* illustrates this conflict between principles of traditional leadership and discrimination.

The Constitution does not outline specific guidelines on how this conflict should be approached. There are, however, indications in the Constitution that fundamental rights have priority over the customary traditional leadership principles such as section 2, guaranteeing the supremacy of the Constitution; section 8(1) providing for the applicability of the Bill of Rights to all legislation; including customary law; section 36(1) allowing rights in the Bill of Rights to be limited by ‘law of general application’, provided that such limitation is reasonable and justifiable in an open and democratic society; section 39(1) requiring the courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom in interpreting the Bill of Rights.

7.6 **Authority systems**

Before proceeding to discuss the Traditional Leadership and Governance Framework Act, we must provide you with insight to what traditional authorities look like in a traditional community. Community (tribal) constitutions differ from one another. However, there are common features.

A typical traditional authority is characterised by a political and administrative component, consisting of a central decision making community government and smaller administrative units to whom powers and functions are delegated to facilitate governance. This central community authority is typically led by a designated traditional leader, who may be in the position of a king, a queen, senior traditional leader etc. Although similarities in the structure of the leadership may be noted, they may differ from one ethnic group to another. The traditional leader makes all decisions affecting the community assisted by certain councils.

7.6.1 *Central community authority (traditional community leader-in council)*

7.6.1.1 **Traditional leader**

To a large extent and with most ethnic groups a traditional leader was passed down in the male line. The principle of patrilineal succession was applied. The process of identifying the person as the next ruler was conducted in accordance with the customs and laws of that particular group. Among many groups the successor had to be of a particular descent such as, for example, the eldest son of the ruler's main wife. There were also particular customs regarding the choice and descent of the main wife. In other words, the different customs of choice of a ruler for a particular tribe were observed and critical here.

7.6.1.2 **Bodies advising the traditional leader**

The most important functions of the traditional head of state were legislative, judicial and executive in nature. He was assisted in his governmental functions by various councils who acted as his advisors.

Although no uniform system could be attributed to all tribes or groups, similarity can be made of the various councils that a ruler would make decisions in the governmental functions of the community. The following councils could be consulted by a traditional leader in the execution of his duties.

- **The private council**

A private council consists of the ward-heads of a few particular wards which do not belong to the royal circle. The advice of this council is informal and limited mainly to less momentous measures in respect of administration and policy. The advice given is purely advisory and is proffered at the request of the senior traditional leader.

- **The privy council**

The privy council is also an informally constituted body but its influence is far more extensive than that of the private council.

On the assumption of office the senior traditional leader relies temporarily on the councilors of his predecessor, but gradually replaces them by confidants of his own choice. Members are usually restricted to chosen males who are close relatives on the father's side, especially brothers and uncles, but the inclusion of one or more influential or well-disposed persons from other sources is not unknown.

Consultation with this body always takes place *in camera* and its authority often overshadows that of the senior traditional leader, although it acts only through the senior traditional leader himself and never as an independent communal authority.

- **The community council**

The most extensive and influential council, is the more formal community council (*kgotla-ya-morafe*). The senior traditional leader and his personal advisors constitute the nucleus of this body, to which is added the heads of the various wards each with their own advisor(s). By special request the heads of the outlying villages may also take part in the consultations.

The senior traditional leader may convene the entire council or only those members concerned with the particular problem.

The senior traditional leader presides and introduces to the council the subject for which the meeting has been called – e.g. the installation of a new senior traditional leader, serious disputes between the senior traditional leader and his near relatives, proposed legislation, the imposition of new levies – in order to feel the pulse of the council before referring these to the community as a whole.

The duty of this council is not only to advise the senior traditional leader on all occasions but also to oppose him if necessary.

- **Community gatherings**

- (i) The community court (*kgotla, lekgotla*), a body with an indefinite composition, is the highest judicial body in the community.

In principle the senior traditional leader acts as a chairman, but in practice a competent senior ward-head is nominated to act for him, the senior traditional leader himself presiding at only very serious cases. All ward-heads have a seat in the council, but attendance is not compulsory unless the senior traditional leader commands it. In practice the court consists of the senior traditional leader or his appointed representative together with a number of experienced councillors; a number of ward-heads who are interested in or concerned with the particular case, together with their advisors; the party or parties concerned in the case; attending the court session out of curiosity or interest.

- (ii) A community gathering or pitso may be convened by the senior traditional leader either to announce or to discuss some matter of minor importance, or to discuss important measures such as taxation and public projects.
- (iii) A *letsholo* is an assembly of adult male community members held only for exceptionally important matters such as a dispute between the senior traditional leader and his brothers, an impending split in the community or friction with some other communities. Attendance is compulsory. People may be brought by force and punished for their absence.

7.7 Recognition and functions of traditional leaders

7.7.1 *Government intervention- indirect rule*

The Colonial and Apartheid government gradually introduced formal regulation of the institution of traditional leadership. This regulation became part of the political strategy of those governments commonly referred to as indirect rule.

7.7.2 *Black Administration Act 38 of 1927*

The implementation of indirect rule was initially through the Native Administration Act which recognized the traditional authorities officially as well as defined their inherent powers and functions.

7.7.3 *Powers, functions and duties*

The powers, functions and duties prescribed for traditional authorities during the colonial period included:

- (a) To further the interests of the community;
- (b) To develop and improve the territory;
- (c) To maintain law and order in the territory; and
- (d) To further the exercise of all acts, regulations in his area in respect of:
 - (i) Public health
 - (ii) Tax
 - (iii) Registration of births and deaths
 - (iv) Prevention of animal diseases; and
 - (v) Land use and administration

7.7.4 *Apartheid*

The Black Authorities Act 68 of 1951 granted a measure of recognition to traditional organs of authority. The Act made provision for self-government on local, regional and territorial level. Provision was also made for the adaptation of traditional authorities to the demands of modern administration. We focus our attention on the tribal or traditional authority.

A traditional authority is composed of the chief and a number of council members. The council members can be nominated by the chief or they can be elected, to the degree that the local African customary law makes provision for this. From this it seems that according to legislation, provision has been made for only one advisory council in tribal administration. The traditional councils are thus not recognised.

According to section 4 the powers, activities and duties of the traditional authority include the following:

- managing the matters of the tribe;
- assistance and guidance to the chief in the exercise of his duties; and
- in general exercising powers and performing activities and duties which are in accordance with the State President's judgement and fall within the scope of the traditional tribal management or the power that he may grant.

7.7.5 *Homeland phase*

This is the phase which during the apartheid era established homeland governments which passed their own laws on traditional leaders and authorities.

7.7.6 *Constitutional recognition*

The current phase of Traditional Leadership is recognised through the Constitution of 1996. Section 211 and 212 which spells out the recognition of traditional leaders has been discussed above in paragraph 7.5.1.

7.7.7 *White paper on Traditional Leadership and Governance*

The resultant effect of Constitutional recognition accorded to traditional leadership has been the need for further legislation on traditional leadership and governance to regulate this institution in line with values of the new democratic system of governance.

A white paper consequently was developed by the Department of Provincial and Local Government, setting out the framework for such legislation. The white paper sought to achieve the following objectives:

- (a) to define the place and role of the institution within the new system of democratic governance;
- (b) transform the institution in accordance with constitutional imperatives;
- (c) restore the integrity and legitimacy of the institution of traditional leadership in accordance with customary law and practices.

7.7.8 *Traditional Leadership and Governance Framework Act*

The Traditional Leadership and Governance Framework Act regulates traditional leadership in the current constitutional dispensation. Its main purpose is the recognition of traditional leadership in accordance with constitutional and democratic dictates.

The aim of the Act, as stated in its preamble, is to:

- Set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance;
- Transform the system in line with constitutional imperatives; and
- Restore the integrity and legitimacy of the institutions of traditional leadership in line with customary law and practice.

More detailed legislation is to be developed by provinces with regard to traditional leadership and governance and other related matters. Traditional leadership, subject to Chapter 12 of the Constitution, falls within the functional areas of concurrent national and provincial legislative competence.

The Act proceeds to regulate the three important spheres of the institution of traditional leadership and governance, by traditional communities, traditional councils and traditional leaders.

7.7.8.1 **Traditional communities**

In terms of section 2(1) of the Act a community may be formally recognised as a traditional community if:

- (a) It is subject to a system of traditional leadership in terms of its customs; and
- (b) Observes a system of customary law. Provinces must adopt legislation to:
- (c) Provide for a process that will allow for reasonably adequate consultation with the community concerned; and
- (d) Prescribe a fixed procedure within which the premier of a province concerned must reach a decision regarding the recognition of a community.

The premier of a province may, by notice in the Provincial Gazette, in accordance with the provincial legislation referred to above, recognise a community after consultation with the provincial house of traditional leaders, the community concerned and, if applicable, the king or queen under whose authority that community would fall.

A radical, innovation is that the traditional community must transform and adapt customary law and customs relevant to the application of the Act so as to comply with the Bill of Rights, in particular by:

- (a) Preventing unfair discrimination;
- (b) Promoting equality; and
- (c) Seeking to progressively advance gender representation in the succession to traditional leadership positions.

7.7.8.2 Recognition of kingship and queenship traditional communities

A group of traditional communities may be recognised as a kingship or queenship if they comply with the following criteria.

- They must be recognised as such in terms of applicable provincial legislation.
- Each constituent community must have a recognised traditional council with a defined area of jurisdiction.
- Each must have a recognised senior traditional leader.
- One of the senior traditional leaders who has a higher status than the others must be recognised as king or queen.
- The group must recognise themselves as a distinct group from all other traditional communities; and
- The group must have a system of traditional leadership at a kingship or queenship level.

Recognition of a kingship or queenship traditional community is done by the president in consultation with the national minister responsible for traditional leadership matters, the premier concerned, the provincial and national house of traditional leaders and the senior traditional leaders concerned.

7.7.8.3 Recognition of principal traditional communities

A new concept namely “principal traditional communities” has been introduced. There are now three levels, namely traditional communities, principal traditional communities and kingship or queenship traditional communities.

The criteria for establishing and recognising principal traditional communities are the same as those for kingships and queenships.

Principal traditional communities cater for those communities of higher status than that of ‘ordinary’ traditional communities, but of lesser status than kingships or queenships.

7.7.8.4 Establishment and recognition of councils

A community must be established in respect of each of the three mentioned communities in accordance with principles set out in provincial legislation.

• Traditional councils

A traditional council recognised as above must establish a traditional council. The council may not have more than 30 members, depending on the needs of the community concerned. At least a third of the members must be women. If an insufficient number of women are available the premier may, in accordance with a procedure laid down in provincial legislation, determine a lower threshold for that council.

The members must comprise:

- (a) Traditional leaders and member of the community selected by the senior leader concerned in terms of that community’s customs, having regard to the requirement that at least a third of the members must be women; and
- (b) Members of the community democratically elected for a term of five years and constituting 40 percent of the members of the council.

- **Partnerships between municipalities and traditional councils**

The national and all provincial governments must promote partnerships between municipalities and traditional councils through legislation and other measures. In terms of section 76 of the Local Government Municipal Systems Act 32 of 2000, a municipality may provide municipal services by entering into a municipal service agreement with different entities. In terms of section 5(3) of the Act a traditional council may also enter into such a service delivery agreement.

- **Withdrawal of recognition of traditional communities**

The premier of a province may withdraw the recognition of a traditional community; on being requested to review the position of a community or communities that was or were divided or merged before 1994, or at the request of two or more communities, that want to be merged into a single community.

7.7.8.5 Establishment and recognition of kingship and queenship councils

Similar to the case of traditional councils at least a third of the members must be women. But if an insufficient number are available the minister responsible for traditional leadership matters may determine a lower threshold. The essence of the membership must comprise of:

- 60 percent of traditional leaders, including the king or queen who is an ex officio member and chairperson, and members of the traditional community selected by the king or queen, in terms of the community's customs, taking into account the compliance of the requirement that at least a third must be women; and
- 40 percent of the members elected democratically, by an electoral college consisting of all traditional leaders who fall under the kingship or queenship.

7.7.8.6 Establishment and recognition of principal traditional councils

The Act, as amended, introduces a new concept, namely principal traditional communities. The criteria for establishing principal traditional communities are the same as those for kingships and queenships, except that the institution is referred to as principal traditional communities. It is to cater for those communities of higher status than that of 'ordinary' traditional communities, but of lesser status than kingships or queenships.

A salient feature however, is that in respect of these councils 60 percent of the members are selected by the principal traditional leader and 40 percent are elected democratically.

7.7.8.7 Functions of traditional councils

Section 4(1) of the Act lists 12 functions of the traditional councils. Six of them enjoin the councils to facilitate, contribute towards, participate in and promote development in one form or another. Two of them relate to inherent functions such as administering the affairs of the traditional community in accordance with a custom and tradition, and performing the functions conferred by customary law, customs and statutory law consistent with the Constitution.

The other functions are aimed at supporting municipalities and other government organs.

7.7.8.8 Kingship and queenship councils

This is the first time that the functions of these councils have been legally phrased. The functions relate to the:

- (a) Administering of the affairs of the traditional community in accordance with customs and traditions;
- (b) Assisting, supporting and guiding senior traditional leaders and traditional councils within the jurisdiction of the king- or queenship in the performance of their duties;
- (c) Assisting the king or queen in performing customary functions relating to the recognition of senior traditional leaders within its jurisdiction;

- (d) Dispute resolutions between senior traditional leadership within its jurisdiction;
- (e) Promoting unity between traditional councils within its jurisdiction;
- (f) Assisting the king or queen in performing his/her roles and functions conferred upon him/her by the President in terms of the regulations issued under section 9(5).

7.7.8.9 Functions of principal traditional councils

Their functions are similar to those of traditional councils discussed in paragraph 7.7.8.7 above.

7.7.8.10 Recognition of traditional leadership positions

Four leadership positions are recognised, namely:

- (a) Kingship or queenship;
- (b) Principal traditional leadership;
- (c) Senior traditional leadership; and
- (d) Headmanship.

In addition provision is also made for:

- (a) Regents;
- (b) Acting traditional leaders; and
- (c) Deputy traditional leaders.

7.7.8.11 Recognition of kings and queens

A king or queen is defined to mean a traditional leader:

- (a) under whose authority, or within whose area of jurisdiction, senior traditional leaders exercise authority in accordance with customary law; and
- (b) recognised as such in terms of this Act.

When the need arises for the position of a king or queen to be filled the royal family must identify a person who qualifies in terms of customary law to assume the position. The family must inform the president, the premier of the province concerned and the minister responsible for leadership matters of the person identified and the reason for the identification.

The president must effect the recognition taking into account the need for uniformity in respect of the status offered to a king or queen.

A king or queen may be removed from office on the grounds of:

- (a) Conviction of an offence and a sentence of imprisonment for more than 12 months without the option of a fine;
- (b) Physical incapacity or mental infirmity;
- (c) Wrongful appointment or recognition;
- (d) Transgression of a customary rule or principle that warrants removal.

7.7.8.12 Recognition of principal traditional leaders

A principal traditional leader is defined as a traditional leader:

- (a) Under whose authority, or within whose area of jurisdiction, senior traditional leaders exercise authority in accordance with customary law;
- (b) Recognised as such in terms of section 10A;

The identification of a principal traditional leader is similar to that of a king or queen, but in this instance the premier of the province concerned, must be informed of the person identified and the reason for the identification.

The premier must effect the recognition taking into account the need for uniformity in respect of the status afforded to a principal traditional leader.

A principal traditional leader may be removed from office on the same grounds which apply to a king or queen.

7.7.8.13 Recognition of senior traditional leaders, headmen and headwomen

A senior traditional leader is defined in section 1 of the Act as:

“a traditional leader of a specific community who exercises authority over a number of headmen or headwomen in accordance with customary law or within whose area of jurisdiction a number of headmen or headwomen exercise authority.”

A headman or headwomen is defined, in section 1 of the Act, as:

“a traditional leader who –

- (a) is under the authority of, or exercises authority within the area of jurisdiction of a senior traditional leader in accordance with customary law; and
- (b) is recognised as such in terms of this Act.”

The Act requires senior traditional leaders, headmen or headwomen to be recognised by the premier of the province. The royal family concerned must with due regard to applicable customary law identify the person who qualifies in terms of customary law to assume the position.

This implies that each province must make a law to provide at least for -

- A notice in the Provincial Gazette recognising the person identified;
- A certificate of identification to be issued to the identified person; and
- The provincial house of traditional leaders to be informed.

The provincial legislation may also provide for election or appointment of a headman or headwoman in terms of customary law and customs; and consultation by the premier with the traditional council concerned where a position of senior traditional leader, headman or headwoman is to be filled.

“A senior traditional leader, headman or headwoman may be removed from office on the grounds of –

- (a) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;
- (b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that senior traditional leader, headman or headwoman to function as such;
- (c) wrongful appointment or recognition; or
- (d) a transgression of a customary rule or principle that warrants removal.”

Particulars of the procedure to be followed are contained in section 12(2) and (3) of the Act.

7.7.8.14 Recognition of regents

Where the successor to the position of a king, queen, senior traditional leader, headman or headwoman is still regarded as a minor in terms of applicable customary law or customs a regent may be recognised.

7.7.8.15 Persons acting as traditional leaders

A royal family may, in accordance with provincial legislation, identify a suitable person to act as a king, queen, senior traditional leader, headman or headwoman where a successor has not been iden-

tified or the incumbent is absent from his or her area of jurisdiction for a period of more than six months for the treatment of illness, study purposes or any other lawful purpose.

7.7.8.16 Deputy traditional leaders

A king, queen, senior traditional leader, headman or headwoman may, after consultation with the royal family appoint a deputy to act in his or her stead if he or she:

- (a) becomes a full-time member of a municipal council;
- (b) is elected as a member of a provincial legislature;
- (c) is appointed as a permanent delegate in the National Council of Provinces; or
- (d) is elected to, or appointed in, a full-time position in any house of traditional leaders.

7.7.8.17 Houses of traditional leaders

In the constitutional recognition of the institution of traditional leaders section 212 (2) of the Constitution stated that in dealing with matters relating to traditional leadership, customary law and the customs of communities observing a system of customary law:

- (a) National or provincial legislation may provide for the establishment of houses of traditional leaders; and
- (b) National legislation may establish a council of traditional leaders.

No council of traditional leaders is at present in existence. The Traditional Leadership and Framework Act 41 of 2003 provides for national, provincial and local houses of traditional leaders.

7.7.8.18 National house of traditional leaders

The National House of Traditional Leadership Act relates to the establishment of the National House of Traditional Leaders. The house currently consists of 18 members made up from three members of each of the six provincial houses.

The composition duties and powers of the house are exposed in sections 3 to 5 and 11 of the Act.

7.7.8.19 Provincial houses of traditional leaders

So far seven provincial houses of traditional leaders have been established in terms of provincial legislation:

- Eastern Cape House of Traditional Leaders Act;
- Free State House of Traditional Leaders Act;
- KwaZulu-Natal House of Traditional Leaders Act;
- Limpopo Traditional House of Traditional Leaders Act;
- Mpumalanga Provincial House and Local Houses of Traditional Leaders Act;
- House of Traditional Leaders for the Province of North West Act; and
- Northern Cape Traditional Leadership, Governance and Houses of Traditional Leaders Act.

The composition of the houses of traditional leaders differs from province to province. You will also find that the powers, functions and duties differ in detail.

7.7.8.20 Local houses of traditional leaders

It is in terms of the Traditional Leadership and Government Framework Act pre-emptory to establish local houses of traditional leaders within municipal districts in accordance with provincial legislation.

The composition and functions of local houses are regulated in section 17(2) and (3) of the Act.

Where a local house of traditional leaders cannot be established, the functions of such house are performed by the traditional council within the district municipality of the metropolitan municipality concerned.

7.7.9 *Roles and functions of traditional leadership*

A traditional leader is the living link between members of the traditional community and the ancestors. According to the Traditional Leadership and Governance Framework Act, a Traditional leader performs functions provided for in terms of customary law and customs of the community concerned and in terms of applicable legislation.

The institution of traditional leadership then is in terms of this legislation recognised as having a role to play in development objectives of government. The Act requires that guidelines are prescribed through legislation and other means outlining the role that traditional leadership should play in government functions.

Fifteen (15) functions are identified to which traditional leadership can contribute to development goals of government in their communities. These include, but not limited to agriculture, health, welfare, economic development and tourism.

The minister or member of the provincial executive committee must be involved in the allocation of the roles for traditional leaders. Requisite resources must also be allocated to perform these roles to Traditional leadership.

7.7.10 *Disputes and claims resolution*

Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a matter arising from the implementation of the Act, four avenues have been created to resolve such dispute. Their aid to resolve the dispute must be sought in the following sequence:

- (a) Members of the community and traditional leaders;
- (b) The provincial house of traditional leaders;
- (c) The premier of the province; and
- (d) The Commission on Traditional Leadership Disputes and Claims (the commission).

7.7.11 *Commission*

The commission is established in terms of section 22 of the Act and there are extensive rules about the membership and functioning of the Commission. It may investigate and make recommendations on various matters, for instance:

- (i) Where there is doubt as to whether a kingship or, principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;
- (ii) On a traditional leadership position where the title or right of the incumbent is contested;
- (iii) On claims by communities to be recognised as kingships, queenships, principal traditional communities, traditional communities, or headmanships;
- (iv) In the case of the legitimacy of the establishment or disestablishment of 'tribes' or headmanships;
- (v) On disputes resulting from the determination of traditional authority boundaries as a result of merging or division of traditional communities;
- (vi) All traditional leadership claims and disputes dating from 1 September 1927 to the coming into operation of provincial legislation dealing with traditional leadership and governance matters; and
- (vii) Gender related disputes relating to traditional leadership positions arising after 27 April 1994.

A recommendation of the Commission must, within two weeks of the recommendation having been conveyed to the President and the minister where the position of a king or queen is affected by such a recommendation; and the relevant provincial government and any other relevant functionary to which the recommendation of the Commission applied in accordance with applicable provincial legislation in so far as the consideration of the recommendation does not relate to the recognition or removal of a king or queen.

Although the 'new Commission' is the successor-in-law of the 'old Commission', the significant difference is that the 'old Commission' made final decisions, whereas the 'new Commission' makes

recommendations to the Minister responsible for traditional affairs in relation to kingship or queenship claims; and it makes recommendations to the Premier for claims relating to traditional leadership positions below kingship or queenship. The 'new Commission' also has Provincial Committees which are integral part of the national Commission.

Commissions on Traditional leadership Disputes and Claims are now in place. The Committees are appointed on a five-year contract and comprises members with a depth of knowledge and experience in traditional leadership and customary laws.

7.8 Code of conduct

A national code of conduct for traditional leadership is prescribed by the Act. This code may be supplemented by provincial legislation. The code basically provides for mechanisms to deal with its breach as well as provide for penalties for a breach. It also provide for the appointment of an acting traditional leader during the suspension of the traditional leader.

The commission has provincial committees which were established in terms of Section 2A of the Traditional Leadership and Governance Framework Act. The main function of the provincial committees is to deal with those cases or categories of cases it has been delegated by the Commission. The Eastern Cape Provincial Committee has been delegated by the Commission to deal with all traditional leadership disputes and claims in the Eastern Cape relating to principal traditional leadership, senior traditional leadership, headmanship or headwomanship and traditional boundaries.

7.9 Self-assessment

Indicate whether the following statements are TRUE or FALSE:

1. *Shilubana v Nwamitwa* illustrates that customary law, particularly in relation to the regulation of traditional leadership institutions are often premised on discrimination, particularly on gender.
 - (a) TRUE
 - (b) FALSE
2. Only a ward-head can preside on very serious cases in a traditional court.
 - (a) TRUE
 - (b) FALSE
3. The Traditional Leadership and Governance Framework Act regulates all aspects of customary law including customary marriages.
 - (a) TRUE
 - (b) FALSE
4. The role of the Commission on Traditional Leadership Disputes and Claims is to make final decisions on matters relating to kingship or queenship claims.
 - (a) TRUE
 - (b) FALSE
5. A major shortcoming in the Constitution is that it does not expressly recognise traditional leadership.
 - (a) TRUE
 - (b) FALSE

SOURCES REFERRED TO IN THIS STUDY UNIT

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STUDY UNIT 8

Law of property and land rights

8.1 Learning outcomes

After having studied this study unit, you should be able to:

- provide an analysis of how land and rights are regulated in terms of customary law.
- discuss the characteristics of the right to property in customary law.
- explain the communal land tenure system.

8.2 Property rights in customary law and the Constitution

Although it may be stated that common law is generally applicable to the law relating to property, certain circumstances may dictate the application of customary law. Such circumstances may include, amongst others, the nature of the right to the property, such as inheritance or succession, the nature of the property itself and the place where the property is situated.

Generally if property is situated in a communal area, the legal system to be used to disputes relating to such property is customary law. One should expect the converse in respect of property situated in urban areas. Recently it had been decided that customary law may also be used in determining disputes relating to property in urban areas as far as succession is concerned.

The High Court of South Africa confirmed that customary law has been accepted by the framers of the constitution as a separate legal and cultural system which may be freely chosen by persons desiring to do so.

In the context of customary law, the law of property may be defined as those rules of customary law and statutory law as interpreted by our courts in compliance with the provisions of the Constitution of the Republic of South Africa which regulate the relationship between a person with regard to his or her property. The Constitution, which is supreme, grants protection to rights or freedom recognised or conferred by customary law, common law or legislation if such rights are consistent with the Bill of Rights.

Van der Walt and Pienaar describe the effect of the Constitution on the customary law of property as follows:

“Effectively this means that customary law and customary property rights shall continue to exist and to be recognised by the courts, unless they are inconsistent with fundamental rights protected by Chapter 2 of the Constitution. In future these rights will also have to be interpreted and applied with due regard to the spirit and objectives of the Constitution.” (Introduction to the Law of Property (1997) 394-5).

8.3 Definition of property and the characteristics of the right to property in customary law

Property is traditionally defined as anything that is capable of being owned or possessed and which is useful or beneficial to a person. The objects relating to a right to property may be of various kinds, namely, moveable and immovable; consumable and non-consumable, divisible and indivisible, fungible and non-fungible, or negotiable and non-negotiable. The right implies a relationship between the holder of the right and the object and at the same time also a relationship between the holder and other person, that is, a dual relationship.

In traditional customary law rights, including property rights, were granted to family or agnatic groups with the members sharing the groups' rights to property. Colonial perception was that families were the only persons with full legal capacity in terms of customary law, but this did not imply that

other members of the family could not acquire rights to property. Rights of individuals were protected through their families.

In African traditional communities the emphasis always fell on the family group as an individual has status and functions within the group context. Thus an individual is deemed to have acquired or to acquire a right through his or her family head. This right is then also protected by or through the family head. It is important to note that the property of the family home was not owned outright by the family head, but was held in communal ownership by the family as a unit, under his administration and control.

Customary law recognises the right of ownership and other limited real rights over property, but the nature and content of these rights must be understood within the framework of family relationships, i.e. in the context of marriage, family and succession. Thus customary law recognises family property, house property and personal property.

House property means the property vested in and pertaining specially to any house in a family home. Such property is acquired by donations or apportionments and from the lobolo received for girls of that house. House property includes: The earning of a woman of a house; any earnings of a midwife or medicine woman; cattle or goods gifted by a father to his daughter on marriage. It should be observed that the indlunkulu (great house) has its own property which is quite separate from family home property.

Family home property means all property in a family home, other than property vesting in or pertaining to a particular house in a family home, and other than the personal property of a major inmate or of any inmate not related to or belonging to the family of the family home head.

Personal property is property other than house or family home property, and which belongs to a major inmate of the family home. Thus it had been held that a bicycle and wearing apparel belonging to a deceased were his personal property.

Customary law rights to property could be acquired in various ways, namely:

- Allotment
- Succession
- Certain customary transactions relating to marriage
- Original means, such as appropriation of ownerless things, manufacture, cultivation and administrative allotment
- Derivative means such as transfer of property or purchase or exchange of things

8.4 Right to land

The customary system of land tenure in the African areas was generally referred to as “communal land tenure”. Thus before discussing the basic legislative network relating to the right to land it is necessary to refer briefly to the nature of communal land tenure.

8.4.1 *The nature of communal land tenure*

The idea of individual ownership of immovable property, notably land, is ill-developed in African law. Ownership was said to vest in the community. But a description in English or Roman-Dutch legal terminology was more difficult than meets the eye. The African concept of ownership differed from the European perception of ownership as the sum total of all the real rights which a person can possibly have over land.

Various writers described communal tenure. Although they differed in detail their description had the following features in common.

- The land “belongs” to the community. A community would not say it “owned” the land, because ownership of immovable property was unknown and also impractical. Later some communities (tribes) acquired property but it was registered in the name of the Minister to be held in trust for the community. Normally a community acquired land by conquest or first settlement on vacant land and succession by one generation after another.

- The land constituted a religious character in that it was acquired by and held in trust by the spirits of the ancestors.
- The land was simply required by the community for sustenance that is a means of livelihood. It was for economic reasons not for sale or exchange.

Saying that the land was acquired by and belonged to the community calls for an explanation. It is not easy to capture the term community in a legal definition. For practical purposes the land area was divided into wards under headmen or headwomen. To this day those wards are recognised as communal sub-divisions. Yet communal cannot be cast in a geographical mould. Bennett makes it clearer when he says:

“Communal” is unobjectionable if it is intended to imply that all the members of a community have equal claims to land or that membership of a political community is the basis of an individual's entitlement to land. Communal is also perhaps unobjectionable if it suggest that an individual is not free to use and dispose of land at will. In other words, landholders must obtain permission from the relevant authorities before changing the conditions of their tenure or before attempting to alienate their interests.” (Customary Law in South Africa (2004)).

It was thus obviously not a system of collective use of the land. Schapera and Goodwin stated that the livelihood of Africans is intimately bound up with their system of land tenure. “...they erect their dwellings on the land allocated to them” (“Work and wealth” in *The Bantu-Speaking Tribes of South Africa* (1966) 156).

Schapera and Goodwin further said that the natural resources of the land – water, grass, trees, etc. – were common property and never reserved for the use of any particular person. It is only in regard to land for residence and cultivation that private rights were recognised. The head of every household (family head) had exclusive rights over the land on which his family home was built and which he cultivated. It was allotted to him by his headman (induna). The land remained his as long as he lived and he had a right based on custom or usage over his arable land, whether it was ploughed or lying fallow. Other members of the community could graze their cattle on the lands when the crops have been reaped. Women could gather firewood or wild plants from it. The owner was the only person, however, that could cultivate it. On his death his heir (mostly the first-born son of the chief wife) inherited it though in terms of the land regulations the land reverted to the community upon his death and was re-allotted to the heirs.

The family head divided the land amongst family members of his household. Each wife got a field for her own use and for the support of the inmates of her house. The husband could not interfere with this field and could not transfer it to another wife without the consent of the wife to whom it was originally allotted. Sometimes a field would be cultivated by the household in common.

It was therefore a colonial misconception that an allotment “belonged” to a family head in person. It was family property.

In practice many female-headed households to this day occupy and use land, although in terms of the Regulations they may acquire rights to land only through the male family head, when he died or allotted it to them.

The Cape of Good Hope Commission on Native Laws and Customs came to the conclusion that, according to Native law and custom, land occupied by a tribe belonged in theory to the paramount chief, whose property such land was regarded. He (senior traditional leader) was regarded as the trustee of the land and his subjects held the land on a communal basis under him. However, a member of the community had certain exclusive rights to the land, and the crops he produced belonged to him and not to the community as a whole. The commonage, or grazing land, was of course communal.

The contention that the senior traditional leader was the owner of the land was so obviously wrong that it does not call for comments. On the other hand it makes some sense to say he held the land in trust for the community. But a trustee is a common law legal figure. Bennett says:

“Again, the word “trust” gives only a partial understanding of customary tenure. It helps to signify a traditional ruler's responsibility to ensure that all his subjects have a place to live and farm on the land under his jurisdiction, and it may explain why he may not alienate land or dispossess individual landholders. But the notion of “usufructuary” rights does not do justice to a landholder's interest in customary law. Nor is the concept of trust of any use in situations where rulers abuse their powers, because the customary landholders have none of the remedies that would be available to a trust beneficiary under the common law”.

Bennett concludes that we should free ourselves

“...from the ownership paradigm (and the ideologies underlying both absolute and communal ownership) It is not necessary to postulate traditional rulers, families and individuals having parts of the same interest in land. Instead, we can say that these interests are different and concurrent. It follows that the head of a community and his political subordinates have the power to control allocation and use of land, while members of the community have a right to benefit from the land allotted to them. Customary tenure then appears as a system of complementary interest held simultaneously”.

8.4.2 *Land administration systems which relate to communal land*

The land administration systems which relate to communal land have since 27 April 1994 virtually collapsed, except in KwaZulu-Natal. The problems which led to the breakdown are well documented (See Sibanda “The Democratisation of the System of Land Administration in Communal Areas and the Changing Role of the Indigenous Leadership and Institutions in the Administration of Communal Land with specific reference to the requirements of the Communal Land Rights Act no. 11 of 2004” *Walter Sisulu University Law Journal* (2006) 22-24) and can briefly be summarised as follows:

- The plethora of legislation and administrative regimes dealing with land administration systems and other land related matters in the former independent and self-governing areas in the provinces of Eastern Cape, Free State, Mpumalanga, North West and Limpopo (Many of these authorities had their own land tenure legislation which after 1984 had to be repealed or re-enforced and delegated to the provinces in which they were situated).
- The ignoring of delegated powers and duties in the conduct of land administration.
- Permission to occupy (PTO) certificates issued in the former self-governing areas after 27 April 1994 were not legally valid, except in Kwazulu-Natal where it was officially validated in terms of legislation.
- The withdrawal of magistrates in April 1994 regarding the performance of administrative duties on an agency basis for other departments. No legislative provision was made to substitute magistrates.
- The disintegration of land administrative systems led to civic and community based organisations/institutions, as well as traditional leadership institutions administering informal systems outside a legal framework.
- Keeping and updating of records have collapsed.

As mentioned before land usage in customary law is mostly based on communal land tenure. “Communal land” in this sense means land that is occupied or used by members of a community subject to the rules or custom of that community. Bearing in mind our historical past, communal land is land that was previously set aside for occupation by African people under the Black Lands Act 27 of 1913 (scheduled areas) and the Development and Trust Land Act 18 of 1936 (released areas).

We can actually distinguish between land tenure rights available to people living (a) in communal land areas, and (b) outside communal land areas. Land rights on communal land was based on customary law or on insecure permits granted under laws that were applied exclusively to Africans; it did not relate to full legal status of ownership.

The Communal Land Rights Act 11 of 2004 attempted to ensure that legally insecure rights be made more secure. The act was declared unconstitutional for failure to follow the correct parliamentary procedures. The court did not go into the merits of the act and it was intimated that the responsible department was no longer interested in the Act as it was developing a new land policy.

The Communal Land Rights Act repealed certain old order legislation which applied to communal land, but in light of the Act being unconstitutional such old order legislation remains in practice.

Three main types of land tenure rights are in existence, and they are:

- Traditional communal land tenure;
- Permission to occupy (PTO); and
- Quitrent.

The latter two are based on old order legislation. We will also briefly refer to the KwaZulu-Natal Ingonyama Trust Act 3 of 1994.

8.4.3 Traditional communal land tenure

The communal land is possessed communally and falls under the control and disposal of the community. Each community controls its own communal area, and this consists of:

- Residential allotments;
- Arable allotments;
- The remaining area reserved for grazing and for extending the residential and arable allotments.

The process in obtaining such tenure right can briefly be described as follows:

- (a) Access to land was operationalised through the *ukukhonza* system. (The process is still practiced today but to a far lesser extent when population pressure on land was not an issue).
- (b) A person approached a sub-*induna* (*induna*) with a request for the allocation of land or a land tenure right for residential and arable purposes.
- (c) If the land was identified in advance by the applicant and other people supporting his application for a right to a piece of land:
 - (i) The prospective rights holder and the sub-*induna* (*induna*) inspected the land and consulted with the other affected households or families in the immediate locality.
 - (ii) The matter is thereafter brought by the sub-*induna* to the attention of the chief-*induna*;
 - (iii) The chief-*induna* would invite members of the local community to indicate their willingness to accommodate the applicant;
 - (iv) Finally on acceptance of the applicant, the chief *induna* will submit the decision to the traditional leader and traditional council for approval.
- (d) Should the land not be identified in advance, and on request for land tenure right by the applicant:
 - (i) The sub-*induna* (*induna*) consults the households or families in the immediate vicinity to establish whether land was available to meet the applicants need;
 - (ii) If land was available and the applicant acceptable to the community the matter was submitted to the traditional leader and traditional council for ratification.
- (e) The new lands right holder then paid a token fee as a gesture of belonging to and acceptance into the community as a full adult member.

Individual households had and continue to have exclusive rights to their residential and arable allotments and although women have limited or conditional access to land such rights have occasionally been allocated to them. Thus land allotted to a family is to the exclusive use and enjoyment of the members of such family and not the traditional leader. The use of the right is controlled by the family head and is transferable in terms of customary law. The rule that such use and enjoyment cannot be alienated for consideration is not strictly adhered to as such alienation these days has to be approved by the traditional leader and his council and the buyer has to be acceptable to the community.

A person could be deprived of his land tenure rights if he violated the customs and norms of the community.

8.4.4 Old order legislation

The occupation of land in terms of customary law was governed by various enactments. These enactments include, inter alia, the two Land Acts which were repealed in 1991 (the Black Lands Act 27 of 1913 and the Development Trust and Land Act 38 of 1936). The land regulations contained in Proclamation R188 of 1969 also governed such occupation. These regulations were promulgated under section 25 of the Black Administration Act 38 of 1927.

The empowering provision in the Black Administration Act has since been replaced and no provision was made to retain the Land Regulations, but it may be accepted that existing rights remain in

force, e.g. a person who holds a quitrent lot (see below) would still hold it in terms of the regulations.

The regulations contain provisions about land administration and two types of land tenure: permission to occupy and quitrent, granted over and held in trust by the State or formerly the Development Trust on behalf of the community. Permission to occupy is defined as:

“Permission in writing granted or deemed to be granted in the prescribed manner to any person to occupy a specified area or trust land for a specific purpose” (Section 47(5) of Proclamation R188 of 1969).

8.4.4.1 Permission to occupy

The allocation of land tenure rights through the issue of permission to occupy certificates was based on the traditional communal land tenure system referred to in paragraph 4.1 above. The certificate was issued in terms of Chapter 5 of the Black Areas Land Regulations and was generally issued to a person who is the head of a household or family. The land tenure rights were described in the Upgrading of Land Tenure rights Act (ULTRA) as Schedule 2 rights.

Schedule 2 rights are described in ULTRA as follows:

1. Any permission granted in terms regulation 5(1) of the Irrigation Schemes Control Regulations, 1963 (Proclamation R5 of 1963), to occupy any irrigation and residential allotment.
2. Any permission to occupy any allotment within the meaning of the Black Areas Land Regulations, 1969 (Proclamation R188 of 1969).
3. Any right of occupation granted to any registered occupier as defined in section 1 of the Rural Areas Act (House of Representatives), 1987 (Act 9 of 1987).
4. Any right to the occupation of communal land granted under the indigenous African law or customs of an indigenous African community in question.

In practice the same procedure in the allocation of land tenure rights as explained in paragraph 8.4.3 above was followed, but the traditional leader and traditional council now only recommended the granting of the tenure rights. The commissioners of a district, and later the magistrates, were the competent authorities who approved the tenure rights by issuing the permission to occupy (PTO) certificate to the applicant after consultation with the traditional leader and his traditional council.

PTOs do not provide tenure security and could not be used as collateral: they do not convey ownership. They could not be transferred, ceded, leased, sublet or disposed of except with the prior approval of the commissioner/magistrate as prescribed in the regulations. A PTO could however be upgraded to full ownership in terms of the Upgrading of Land Tenure Rights Act, following prescribed procedures. Only in KwaZulu-Natal, the former KwaZulu-Natal Finance Corporation, and now Ithala, offered and continues to offer loans to prospective applicants on the basis of the PTO rights.

Applicants were normally male heads of families or widowed female heads of such households or families. In polygamous marriages the commissioner or magistrate could authorise the allotment of residential or arable land or both to such applicants in respect of more than one or all of their wives. In practice, although not authorised by existing legislation, land tenure rights have also been allocated to female headed households. Indeed nowadays land has also been allocated to unmarried and divorced women.

PTOs could be cancelled only by a commissioner or magistrate after a prescribed administrative enquiry.

It appears that the regulations enforced a change of communal to individual tenure in the so-called communal areas.

8.4.4.2 The Ingonyama Trust Land in KwaZulu-Natal

In KwaZulu-Natal the communal land vests in the Ingonyama and is administered by the Ingonyama Trust in terms of the KwaZulu-Natal Ingonyama Trust Act. The land is held in trust for the traditional communities referred to in the Schedule to the Act. It holds the land in question not for itself but on behalf of the traditional communities and for the benefit of the latter. The Act empowers the Ingonyama Trust Board to transfer communal land in KwaZulu-Natal to traditional communities in accordance with the requirements of the Act.

8.4.4.3 Quitrent

Quitrent is a tenure form that was originally allocated to individuals for perpetual occupation. It relates to rights to surveyed lots and are granted or transferred to an individual as sole owner by a deed registered in a deeds registry, and in which the conditions of grant are prescribed. The rights were issued in terms of the Native Locations Land and Commonage Act 40 of 189, the Glen Grey Act 24 of 1894, and the Black Areas Land Regulations R188 of 1969. In terms of the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA) quitrent is a Schedule 1 right.

As quitrent is a registerable tenure right on surveyed land it is alienable in the market place. Unlike the PTO it is a real right that can be used as collateral, although the State as grantor remains the owner of the land concerned.

This tenure form is mostly found in the Eastern Cape and to a lesser extent in KwaZulu-Natal.

8.4.4.4 Upgrading of customary law and land rights

As rights to land in customary law do not amount to full ownership, the Upgrading of Land Tenure Rights Act 112 of 1991 was passed. In terms of this measure any right relating to land according to customary law may now be converted in ownership by registration in the deeds office.

As a person's right to land in customary law may be terminated by the traditional leader in consultation with his council, the Protection of Informal Rights to Land Act 31 of 1996 provides that people may not be deprived of an "informal right to land" without their consent except by expropriation.

The Act further provides that where land is communally owned and the community decides to dispose of it, provision must be made for appropriate compensation to any person who is deprived of an informal right to land by such disposal (see also section 25 of the Constitution of 1996).

Suffice it to say that it is imperative that an effective, efficient and constitutional compatible land administration system for communal land in South Africa be developed as soon as possible by the responsible government department and the role-players concerned.

8.5 Protection of customary property rights

The customary law of delict provides for remedies where a right to property is infringed. Such remedies entitle a person to damages from the wrongdoer. These remedies are similar to the use of the *action legis aquillae* (action brought by the lessor against the lessee to enforce the contract of hire). Where property held under customary law is stolen, a remedy similar to the action for the theft of the common law is applicable. The thief has to pay twice (or more) the value of the property and a fine.

A remedy similar to the *mandament van spolie* (order for return of property) is also recognised. This remedy entitles a person to vindicate his property from another in the case of unlawful possession. The various remedies available in South African common law may also be used in the protection of property held under customary law.

While that is the customary law as stated, it is probably of academic interest only. Land in communal areas is almost exclusively held in terms of permissions to occupy and quitrent, which is governed by statute. These rights are akin to ownership that may be enforced on the basis of common law. A permission to occupy or a quitrent grant can hardly be regarded as a customary right to land, although the land is situated in a communal area.

8.6 Self-assessment

Indicate whether the following statements are TRUE or FALSE:

1. Customary law recognises family property, house property and personal property.
 - (a) TRUE
 - (b) FALSE
2. A permission to occupy (PTO) is a real right that can be used as collateral.
 - (a) TRUE
 - (b) FALSE

3. In terms of customary law, a senior traditional leader is the owner of communal land.
 - (a) **TRUE**
 - (b) **FALSE**
4. A quitrent is a registerable tenure right and it is alienable in the market place.
 - (a) **TRUE**
 - (b) **FALSE**
5. In customary law house property, family home property and personal property are synonymous.
 - (a) **TRUE**
 - (b) **FALSE**

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STUDY UNIT 9

Customary marriages

9.1 Learning outcomes

After having studied this study unit, you should be able to:

- differentiate between marriages concluded in terms of the civil law and customary law.
- explain the legal position of civil and customary marriages entered into before 15 November 2000.
- apply the provisions of the Recognition of Customary Marriages Act 120 of 1998.
- explain the significance of *lobolo*.

9.2 Civil marriages in terms of the Black Administration Act

Before embarking on an in depth discussion of the Recognition of Customary Marriages Act (hereinafter referred to as “the Act”) it is necessary to provide a brief overview of the legal position relating to civil marriages and “customary unions” concluded prior to 15 November 2000 (i.e. the date on which the Act became operative).

9.2.1 Position from 1 January 1929 to 1 December 1988 excluding KwaZulu marriages

In terms of the now repealed section 22(6) of the Black Administration Act, which came into operation on 1 January 1929, civil marriages of black persons were automatically out of community of property with the exclusion of profit and loss and with the retention of the marital power by the husband. In order to bring about community of property and of profit and loss where no antenuptial contract was entered into and registered, black persons were obliged to make a declaration in this regard before a marriage officer, one month prior to the celebration of the marriage.

However, such community of profit and loss and retention of the husband’s marital power was only possible where the husband was not a party to a “customary union” with another spouse other than the spouse to whom he intended marrying.

On 1 November 1984, the Matrimonial Property Act was enacted which inter alia abolished the marital power a husband had over a wife in a civil marriage, or in terms of common law. The effect hereof was that, as from 1 November 1984, the marital power which a husband had over his wife in terms of a marriage concluded in terms of the repealed section 22(6) was repealed with retrospective effect.

9.2.2 Effect of a civil marriage on an existing customary union

As the spouses in a customary “union” were not regarded as legally married to one another, a spouse could at any time during the subsistence of such marriage conclude a valid civil marriage with another person. The effect of such civil marriage on the “customary union” was that such union was automatically dissolved. The wife to such customary union was known as a “discarded spouse”. She could also contract a civil marriage with another person and similarly the existing union was automatically dissolved.

Section 22(7) of the Black Administration Act, however, provided some measure of protection for the discarded family when the husband died. For purposes of succession, the status of the widow and children of the civil marriage were deemed to be equivalent to their customary law counterparts. By implication, the preferential status given the civil law wife and children was lost and they ranked equally with the prior discarded wife (or wives) and their children.

9.2.3 *Position from 2 December 1988*

In terms of the Marriage and Matrimonial Property Law Amendment Act, which came into operation on 2 December 1988, the Black Administration Act of 1927 was amended. The Amendment Act brought about the following changes:

9.2.3.1 The repeal of section 22(6)

The effect hereof was that all marriages in South Africa were put on par with one another and the Matrimonial Property Act was also made applicable to marriages of Blacks concluded after 2 December 1988. Marriages thus concluded from 2 December 1988 were automatically in community of property unless an antenuptial contract was entered into and registered within three months in the deeds registry.

9.2.3.2 Restriction on contracting a civil marriage

Another important innovation was that in terms of section 1 of the Marriage and Matrimonial Property Law Amendment Act, the “customary union” was not automatically dissolved by the civil marriage. Since then section 22(1) prohibited a partner in a customary marriage from contracting a civil marriage with another person during the subsistence of such customary marriage.

Unfortunately no sanction was provided in the amending Act where such civil marriage took place subsequent to the customary marriage. In the case of *Netshituka v Netshituka* a marriage contracted on 17 January 1997 by a person who had also been married by customary law to three other women, was declared null and void.

9.2.4 *Position from 15 November 2000: Prohibition of civil marriages to another person by party to a customary marriage*

Section 3(2) of the Act prohibits a spouse who is a party to valid customary marriage from entering into a civil marriage to another person in terms of the Marriage Act. Again no sanction was provided for in the Act where the provisions of the Act are contravened, by a spouse who does conclude the civil marriage. Once again the civil marriage is voidable, depending on the validity of the customary marriage.

9.2.5 *Dual marriages in Transkei*

The Transkei Marriage Act 6 allowed the husband of a subsisting civil marriage to contract additional customary marriages, provided that the civil marriage was out of community of property. Likewise, a husband in a customary union, could also during the subsistence of such a customary union validly contract a civil marriage with a third person, provided the civil marriage was out of community of property.

9.2.6 *Black marriages in terms of section 35(1) of the Code of Zulu Law*

In terms of the provisions of section 35(1) of the KwaZulu Act on the Code of Zulu Law a civil marriage between citizens contracted after the commencement of the Act produced the legal consequences of a marriage out of community of property between the spouses. However, the intending spouses could at any time within one month of the celebration of such marriage declare jointly before any commissioner, or magistrate, or other marriage officer, that it is their intention and desire that community of property and profit and loss shall be included in their marriage, except with regard to any land in a location held under quitrent tenure which land was excluded from such community.

The term ‘citizen’ was defined in the National States Citizenship Act. This Act was repealed by Schedule 7 of the Constitution of the Republic of South Africa, 1996.

Section 3 of the National States Citizenship Act provided that every black person was a citizen of a particular Territorial Authority Area if he or she:

- Was or is born in that area from parents one of whom were or are citizens of that territorial authority area at the time of his birth;
- Has made application for citizenship of a territorial authority area having lived in such territorial authority area for a period of five years;
- Is not a citizen of any other territorial authority area and speaks any Black language used by the Black population in a particular territorial area including any dialect; and
- Is not a citizen of any other territorial authority area and is related to any member of the Black population of a particular territorial authority area, or has identified himself with any part of such population, or is associated with any part of such population by virtue of his cultural or racial background.

The KwaZulu Act on the Code of Zulu Law came into operation on 28 November 1986.

From that date a marriage between two KwaZulu citizens was out of community of property, unless they made a declaration that they wanted to be married in community. But KwaZulu citizenship came to an end when the National States Citizenship Act was repealed in terms of the Constitution of the Republic of South Africa which came into operation on 27 April 1994.

To repeat, from 28 November 1986 to 27 April 1994 marriages between KwaZulu citizens were out of community of property.

With the repeal of the National States Citizenship Act with effect from 27 April 1994 there were no more KwaZulu citizens so that the Matrimonial Property Act applied to marriages from that date and were consequently in community of property (see para. 9.2.1 above) in terms of the Matrimonial Property Act, which came into operation on 3 November 1988 in respect of Blacks.

In summary

- All Black marriages entered into as from 2 December 1988 were in community of property.
- But marriages between KwaZulu citizens continued to be out of community of property until 27 April 1994.

9.2.7 Schematic outline of legal consequences of civil marriages and 'customary unions' entered into before the Recognition of Customary Marriages Act came into operation on 15 November 2000

Legal provision	Type of marriage	Period	Consequences
Section 22(6) of Black Administration Act, 38 of 1922	Civil	1.1.29 – 1.12.1988	Out of community of property, exclusive of profit and loss and retention of marital power unless parties declared within one month prior to marriage that they wanted to be married in community of property
Sections 11&12 of Matrimonial Property Act, 88 of 1984	Civil	1.11.84 to date	Abolition of marital power with retrospective effect
Common law	Civil marriage with another woman during subsistence of a customary marriage	Until 2 December 1988	Customary marriage automatically dissolves civil marriage
Section 22(7) of Black Administration Act 38 of 1927	Civil	Until 2 December 1958	For purposes of succession widow and children of civil marriage deemed equivalent to their customary law counterparts
Section 25 of Matrimonial Property Act, 88 of 1984	Civil	Until 2 December 1988	All civil marriages in community of property unless an antenuptial contract entered into
Section 22(1) and (2) of Black Administration Act, 38 of 1927	Dual marriages	Until 2 December 1988	No partner in a customary marriage, may enter into a civil marriage with another person
Section 3 (2) of Act	Dual marriages	15 November 2000	No partner in a customary marriage, may enter into a civil marriage with another person

Students should know that some marriages entered into since 1929 have not yet been dissolved by death or divorce. Whenever a person consults you about the dissolution of such marriage or succession to a partner, you may use the schematic outline in paragraph 9.2.7 as a checklist.

For instance, the fact that all civil marriages between blacks entered into between 1929 and 1988 were automatically out of community of property, unless they made a declaration that they wanted to be married in community of property is very real. If the marriage was out of community of property the estate devolved in terms of the customary law of succession.

However, the Reform of the Customary Law of Succession and Regulation of Related Matters Act has brought about two radical changes:

- (1) Succession is now governed by the Intestate Succession Act, irrespective of the time of marriage.
- (2) The “discarded” customary wives’ rights are now preserved in that they inherit equally with the wife with whom the deceased was married by civil rites.

9.3 The Recognition of Customary Marriages Act

9.3.1 Recognition

This Act, which came into operation on 15 November 2000, grants recognition to customary marriages including polygynous marriages for all intents and purposes of the law. The Act places customary marriages on the same footing as civil marriages. Besides recognising these marriages, it sets out proprietary consequences, defines the status of the parties to these marriages and lays down requirements for their validity.

A customary marriage is defined as a marriage concluded in terms of customary law. The latter is defined as “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of these people”.

In view of the fact that there may not be discrimination on the ground of race, the question may be asked whether people of non-African origin may enter into customary marriages. People of, say, European origin do not observe customs traditionally observed among the indigenous African people, and would not be entitled to enter into customary marriages. African customs and usages are not part of European culture.

On the other hand there are non-Africans who do observe African customs. They should be able to enter into customary marriages. Race is not the criterion, but the traditional customs and usages.

9.3.2 Requirements

The Act recognises as valid for all purposes two types of marriages, namely:

- “(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act.
- (2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act.”

Thus in order to determine this question, one needs to be aware of the requirements laid down by customary law for the validity of marriages contracted before 15 November 2000 and requirements provided for by the Act, i.e. for those customary marriages contracted after 15 November 2000.

9.3.2.1 Marriages contracted before 15 November 2000

The requirements were as follows:

- The consent of the father of the man under certain circumstances. This is strictly speaking no longer a requirement, but it may be a factor in cases where the father traditionally contributed towards the *lobolo* for a son’s first wife. Refusal to consent would, however, not nullify the marriage.
- The consent of the father of the girl. This was traditionally a requirement, irrespective of the age of the girl.

- Now that all people reach the age of majority at 18 this requirement no longer applies.
- The consent of the husband-to-be.
- The consent of the bride-to-be. Although there were arranged marriages, official courts all along insisted that the bride's consent is a *sine qua non* to a valid customary marriage.
- The transfer or handing-over of the bride. This was and still is ceremoniously done. It is deemed a key requirement. It symbolises the character of a customary marriage – the union of two families. If lobolo were the key requirement, it would be tantamount to a sale of the bride – a mere transaction.
- The transfer of lobolo in whole or part; or a *lobolo* agreement. That too is an essential requirement. A customary marriage without *lobolo* in some form is unthinkable. In *Fanti v Boto* the court confirmed that the foregoing are indeed the requirements for a valid customary marriage.
- The non-existence of a civil marriage. This flows from the fact that a civil marriage is a union of one man and one woman for life.

9.3.3 *Marriages contracted after 15 November 2000*

The requirements for the validity of customary marriages contracted after 15 November 2000 are regulated by section 3 of the Act. They may be summarised as follows:

- The prospective spouses must be above the age of 18 years;
- Consent of both prospective spouses to be married to each other under customary law;
- If either of the prospective spouses is a minor, both his or her parents, or if he or she has had no parents, his or her legal guardian has to consent to the marriage;
- If the consent described above in paragraph 9.2.7 cannot be obtained, section 25 of the Marriage Act applies;

This, in broad outline, means that the consent of the commissioner of child welfare is required where the minor has no parent or guardian or where good reasons exist why the parent's or guardian's consent cannot be obtained. The commissioner may, however, not consent where the parent or guardian refuses consent. In that event the High Court must be approached for consent. If the parent, guardian or commissioner refuses consent to the marriage a judge of the High Court may grant permission; and

- The marriage must be negotiated and entered into or celebrated in accordance with customary law.

The latter provision, despite the foregoing statutory requirements, is a statutory confirmation of the customary law essentials of a customary marriage. It would entail at least –

- Negotiations and consensual agreement of the two families not only of the proposed marriage but also the *lobolo*;
- Transfer of *lobolo* in whole or in part;
- Traditional ceremonies and exchange of gifts (depending on the circumstances); and
- Handing over or integration of the bride with the bridegroom's family.

To indicate what makes a customary marriage binding and valid we quote an excerpt from the decision in *Sila v Masuku*:

“[The] process of [marriage] is gradual and involves a series of changes in (1) the attitude of the two contracting groups towards each other; (2) the actual transaction which consists of the exchange of the rights in the woman for cattle and thereafter follows; (3) the adjustment of the woman in her new office: (a) her elevation from maidenhood to wifehood; (b) her departure from and farewell to the group and its ancestors; and (c) her introduction to the new group and its ancestors and her affiliation thereto.”

There are usually three distinct stages:

- The first stage, as described in *Sila v Masuku* (*supra*) “involves visits, *pourparlers* and the exchange of social courtesies, all designed to establish concord between the groups, culminating in the consent of the groups to the marriage”

- In stage two the extent of the *lobolo* is arranged. Although many rituals and ceremonies precede a wedding, only once agreement on the *lobolo* has been reached does the engagement become official. Although *lobolo* is not mentioned as a requirement for a customary marriage in the Act, it is obviously a requirement.
- The third stage involves the bride in person and not the groups as contracting parties. She must formally leave her family home. This is usually accompanied by some symbolic ritual. Thereafter she is aggregated to her husband's group, again symbolised by rituals. Once she is aggregated she 'belongs' to her husband's group.

Any children born to her belongs to the husband's group and even death does not dissolve the marriage.

In *Mabuza v Mbatha* the court held that the *ukumekeza* custom symbolically integrating a Swazi bride with her husband's family is not a requirement for the validity of the marriage. The judge's finding that by agreement the parties may do away with the *ukumekeza* custom is questionable. Even so, it is evidence that the marriage was indeed "entered into", albeit not a requirement in the full sense of the word.

9.3.4 *The position of lobolo*

The Act does not prescribe *lobolo* as a requirement for the validity of a customary marriage. Although this is the position, the Act makes specific provision that **"the marriage must be negotiated and entered into or celebrated in accordance with customary law."**

The provision may be interpreted as meaning that the negotiations preceding the entering into of a customary marriage are regarded as requirements for its validity. An agreement relating to *lobolo* is concluded before the marriage is contracted.

The significance of the *lobolo* contract is that it transfers the woman and her children to the family of her husband. She thus becomes a wife of such family and her children, born before or after the marriage, also become members of the family of her husband. This is irrespective of whom the natural fathers of such children may be.

Lobolo is defined in section 1 of this Act as:

"the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohadi*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which the prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage" (section 1(iv)).

In terms of section 4(4) of the Act –

"A registering officer must be satisfied that the spouses concluded a valid marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any *lobolo* agreed to and any other particulars prescribed."

In addition to bringing about a valid customary marriage, through the *lobolo* contract the husband also acquires rights akin to custody and guardianship over the children of the marriage.

A marriage without *lobolo* is in fact unthinkable. It is so to speak the essence of the union between the two families, and a symbol of the wife's reproductive capacity belonging to her husband's family.

Research has shown that even Africans in urban areas still put a high premium on *lobolo* – some women saying a woman is not properly married if *lobolo* has not been transferred.

9.3.5 *Customary cum civil marriages*

A spouse in a customary marriage is not competent to contract a civil marriage with another partner during the subsistence of the customary marriage.

9.3.6 Customary marriages cum civil unions

The Civil Union Act commenced on 30 November 2006. In terms of section 8(3) of this Act, any person who is married in terms of the Recognition of Customary Marriages Act may not register a civil union while that marriage subsists. The reference to 'civil marriage' in section 3(2) set out above now also includes a civil union.

There is an exception in the sense that a man and a woman between whom a customary marriage exists may contract a civil marriage with each other if neither of them is a spouse in a subsisting customary marriage with another person.

9.3.7 Prohibited degrees of affinity

According to the Act, the prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law. They may differ from one community to another. For instance, Zulu persons with the same clan name (known as *isiduko* in isiXhosa and *isibongo* in isiZulu) may not marry each other.

9.3.8 Age of majority

Section 17 of the Children's Act came into operation of 1 July 2007. This section provides that a child, whether male or female, becomes a major upon reaching the age of 18 years. This means that in South Africa currently the legal position is that majority is attained at reaching the age of 18 years. Consequently all references to children or minors in the Act should be interpreted as persons younger than 18 years.

9.4 Registration of customary marriages

The Act seeks to ensure that customary marriages are registered, although it does not make this a requirement of a valid marriage. Registration provides certainty. There are also statistical and other reasons for the registration of customary marriages.

The Act places a duty on spouses to customary marriages to ensure that they register their marriages under section 4(1). The Act stipulates time periods in which registration must be completed, unless extended by a notice in the *Government Gazette*.

- Section 4(3) obliges spouses in customary marriages entered into before the commencement of the Act, or 15 November 2000, to register within 12 months of the commencement of the Act.
- Spouses married after the commencement of the Act have three months after the completion of the marriage within which to register their customary marriage.
- The Minister of Home Affairs may extend these time periods by giving notice in the *Government Gazette*. This period has been officially extended to the end of 2014. The Act does not create any sanctions for failure to register, which suggests that there should not be any sanctions for late registration.

Although the duty to register a customary marriage seems straightforward, the provision does not address at what point in the process of a customary marriage the duty arises. Must the couple wait until all elements of the agreements are completed? The problem with this is that lobolo is not always provided before the marriages are considered complete. Should the duty to register arise once the negotiations are completed? The conclusion of a customary marriage is a process, not a single event. The Act does not specify what happens where the spouses fail to register. However, section 4(9) states that the marriage is not void for failure to register. The legislature did not want to create additional hardships on the spouses and deprive valid customary marriages of their status.

Section 11(4), however, does allow for the Minister of Justice, in consultation with the Minister of Home Affairs, to make regulations creating an offence for failure to comply with the Act. No regulation regarding the failure to register a customary marriage currently exists. Thus, there seem to be no real consequences as yet for the breach of the duty to register a customary marriage.

The Act and regulations provide that an application for registration may be made before a registering officer or a designated person.

A registering officer is defined in section 1 of the Act as a person appointed as such by the Minister or the Director-General of Home Affairs. Registering officers may be officials of Home Affairs or may be other persons appointed to be registering officers.

Designated persons are people who have been designated by the Director-General of Home Affairs to perform certain functions in terms of the regulations to the Act.

Designated persons do not have the power to register a marriage. They are required by the regulations to provide a receipt acknowledging the application for registration, and then to forward the application to the nearest regional or district office of the Department of Home Affairs. The appointment of designated persons allows the Department to ensure that registration is accessible to those who do not live near district or regional offices of the Department.

Registering officers have the power to register marriages. It is their responsibility to confirm the validity of the information contained in the application forms and the signatures attested to in the forms. They are also required to issue a receipt acknowledging the application.

If the registering officer is an official of Home Affairs, then he or she may register the marriage and cause it to be included in the population register.

If the registering officer is not an official of Home Affairs, then after registration, he or she must ensure that the application forms are forwarded to the nearest office of Home Affairs in the region or district.

Section 4 of the Act and the accompanying regulations set out the procedure by which couples should register their marriages.

Section 4(2) specifically allows 'either spouse' to register the marriage on behalf of both spouses. It allows one or both spouses to apply to a registering officer for the registration of their marriage.

The Act also allows '*interested parties to apply to register a customary marriage on behalf of the spouses*'.

An interested party may be a friend, a relative, a traditional leader or one of the people who participated in the marriage negotiations between the two families. He or she could also be one of the husband's other wives or the children of the marriage or of the husband from another marriage. Also relevant may be persons with an interest in communal land under the control of the husband, business partners and fellow trustees. It appears to be left within the discretion of the registering officer as to who constitutes an interested party. As long as the party seeking to register the marriage satisfies the registering officer that he or she has '*a sufficient interest in the matter*', they may apply for registration.

Under section 4(5), the interested party may provide the registering officer with the necessary information in the application form for registration. If the interested party provides enough information to suggest a marriage exists, the registering officer is required under section 4(5)(b) to register the marriage and provide a certificate of marriage if s/he is satisfied that the spouses were married under customary law.

Section 4(2) of the Act requires the spouse(s) or interested party to complete a registration form and provide the registering officer with any other necessary information. The Minister of Justice, in consultation with the Minister of Home Affairs, is responsible for creating the registration form and for identifying the necessary information the spouse or couple must provide to the registering officer.

The regulations to the Act include the forms to be used in the registration process.

9.5 Proof of registration of a customary marriage as a requirement for validity

Proof of the existence of a customary marriage is notoriously vague. Previously customary marriages were not registered except in KwaZulu and Natal where the codes made it obligatory. Regulations providing for the registration of customary marriages in the so-called "black areas", later commonly referred to as "homelands", were also promulgated in terms of section 22 bis of the Black Administration Act.

These regulations were never implemented. In KwaZulu and Natal, registration virtually became part and parcel of the conclusion of customary marriages. In Transkei, registration was provided for by the Transkei Marriage Act, but enquiries revealed that registrations were few and far between.

The production of a certificate issued in terms of the Black Laws Amendment Act for purposes of a road accident fund claim is regarded as conclusive proof of the existence of a valid customary marriage with the deceased spouse. Conflicting decisions were reached by our courts as to the nature of the certificate and the time at which it has to be produced.

Despite this conflict, it is clear that what was required was a certificate issued by a commissioner (previously) or a magistrate stating that a customary marriage existed between the claimant and the deceased and was still in existence at the time of death. The issuing of the certificate may be based on the information obtained from a marriage register or from an enquiry held by a magistrate or commissioner, as the case may be.

Despite the foregoing it is presently accepted, since the decision in *Hlela v Commercial Union Assurance Co of SA Ltd*, that:

- A plaintiff cannot be compelled to produce the certificate to the defendant prior to issuing of the summons;
- The pleadings need not contain an allegation that the section 31(2) certificate is in possession of the plaintiff and is available to the defendant;
- The certificate must be produced to the court (and not to the defendant);
- The certificate should be handed in when the existence of the customary marriage is being proved;
- The pleadings need to aver that neither the plaintiff nor the deceased breadwinner at the time of his death was a party to a common law marriage; and
- The section 31 certificate may be issued on the basis of information derived from a register of customary marriages or from other sources.”

It was understandable that the Black Laws Amendment Act of 1963 contained an elaborate provision that a claimant for damages should produce a certificate issued by a commissioner (later magistrate) to the effect that a customary marriage had been entered into and was still in existence at the time of death of the deceased partner.

These certificates served a purpose, although we were informed that many of them were questionable being issued after only cursory enquiries. The Road Accident Fund is tied down by them except that it may question the findings of the magistrate in the High Court for which it would have to produce its own evidence to the contrary.

If a marriage is for some or other reason not registered or if the registering officer refuses to register it -

“A court may, upon application made to that court and upon investigation instituted by that court, order (a) the registration of any customary marriage”.

In *Baadjies v Matubela* the court held that registration constitutes *prima facie* proof of existence of the marriage. However, spouses not in possession of such certificate may apply to court in terms of section 4(7)(a) for an order that such certificate be issued.

One would have thought that the Act should have provided a solution. Although this Act provides that customary marriages have to be registered, *“failure to register a customary marriage does not affect its validity”*.

It is submitted that the Road Accident Fund is still bound by the provisions of the Black Laws Amendment Act but the Act has no right of existence in isolation.

The problem is further aggravated by the fact that customary marriages entered into before the commencement of the Act had to be registered within 12 months after its commencement. This period was extended to 31 December 2010.

9.6 Proof of existence of a customary marriage

Since the Act came into effect proof of the existence has become a major legal issue. The problem emanates from the fact that –

- Previous marriages are recognised if they are valid at customary law and existing at the commencement of the Act.

- Post-recognition marriages must be negotiated and entered into or celebrated in accordance with customary law. Naturally previous marriages also had to be entered in accordance with customary law.
- This has given rise to a host of disputes. Depending on what suits them, parties delve into the customary “law” negotiations and celebrations to serve their purpose. Sometimes it pays to be married, sometimes to be unmarried.

Unfortunately the courts have not laid down coherent guidelines. The only identifiable trend is that the courts on an ad hoc basis hold that customary law has developed or not practiced as it used to be. It is indeed true that some rituals and practices are not performed as in traditional societies.

However, in *Fanti v Boto* the court has provided some useful guidelines. The judge held that the requirements for a valid customary marriage are:

- consensual agreement between two family groups as to two individuals who are to be married and *lobolo* to be paid; and
- transfer of the bride by her family group to the family of the man.

Payment of *lobolo* is merely one of the essential requirements and not sufficient in absence of other essential requirements. Where the bride’s father is dead or unable to discharge duties normally meant for a family head, the mother is entitled to act as head of the family and negotiate for and receive payment of *lobolo*. That would be development of customary law in accordance with the spirit, purport and objects’ of the Constitution. Customary marriages must take place in the presence of the head of the bride’s family or those representing the family. Formal transfer of the bride to her husband or his family is required. In *Ngema v Dabengwa* (case no: 2011/3726) the plaintiff alleged that she and the defendant were married in terms of customary law because *lobolo* had been successfully negotiated and transferred. Lamont J held that although both parties willingly engaged in the process of *lobolo*, the defendant did not consent to be married.

Therefore, *lobolo* alone does not constitute marriage.

9.7 Equal status and capacity of spouses

Whereas previously the wife to a customary marriage was regarded as a minor in terms of section 11(3)(b) of the Black Administration Act, in terms of the Recognition of Customary Marriages Act she now enjoys the same status and capacity as her husband. She is thus of full status and can acquire assets and dispose of them. She also has full contractual and litigation capacity. The rights and powers that she might have at customary law are also protected. 33

It is not clear what powers a woman has at customary law. The system is patriarchal – the husband and family head having all powers for legal purposes. He would consult his wife, but her consent was not legally required. One might consider her role as “owner” of her house in a household, but that is too vague to call it a power. She does, however, have a right to her house, so much so that she would have a right to remain in occupation when her husband dies.

This is obviously inequality in the evident sense of the word. The subordinate position of African women – sometimes ascribed to colonialism and apartheid – has long been a bone of contention. Bekker and Boonzaaier³⁴ dispel all notions that the equality is somehow not what it purports to be. Women have indeed acquired legal equal status.

There is, of course, still *de facto* subordination of women, which is a universal phenomenon. This would require a change in attitudes. The outreach of the law is limited.

On the other hand there are a vast number of female-headed households: never-married single women, divorcees, widows or women who do not live with their husbands. They wheel and deal *ad libitum*. Section 6 of the Act removes any doubts about their legal capacity.

9.8 Proprietary consequences

Depending on the date on which the marriage was contracted, the proprietary consequences were either regulated by customary law or the common law. Customary law regulated the proprietary consequences of marriages contracted before 15 November 2000. This meant that a marriage contracted before this date was still deemed to have created a “house”.

In the case of *Gumede v President of the RSA* section 7(1) was declared to be unconstitutional and invalid because it discriminates between persons married before and after the Act came into operation but only in regard to monogamous marriages.

A customary marriage contracted after 15 November 2000 is in community of property and of profit and loss provided that the husband is not a spouse in another existing customary marriage.

This provision was also declared unconstitutional in so far as it related to the distinction between monogamous marriages entered into before and after the Act came into operation. Such consequences may, however, be specifically excluded by antenuptial contract. Spouses to customary marriages concluded before 15 November 2000 may jointly apply to court for leave to change the proprietary consequences applicable to their marriages.

A husband who wishes to contract another customary marriage has to apply to court to approve a written contract which will regulate the future matrimonial property system of his marriages. The court is granted the power to terminate the property system applicable to his marriage and effect a division of the matrimonial property in the case of a marriage in community of property or which is subject to the accrual system. The court is furthermore empowered to effect an equitable distribution of property by taking into account all the relevant circumstances of the family groups which would be affected if the application is granted.

The court may allow amendments to the terms of the contract, grant the order subject to any condition it may deem just or refuse the application if in its opinion the interest of any of the parties would not be safeguarded by the proposed contract. All parties having a sufficient interest in the matter have to be joined in the proceedings, and in particular, the existing spouse and the prospective spouse.

Ever since the promulgation of the Recognition Act namely 15 November 2000, uncertainty prevailed as to whether this requirement must be adhered to for the validity of a polygynous customary marriage.

However, the Constitutional Court has provided legal certainty in this regard (see *Ngwenyama v Mayelane and Another*).

The Constitutional Court held that the requirements for a valid polygynous customary marriage are contained in section 3 of the Act, which reads as follows:

“For a customary marriage to be entered into after the commencement of this Act to be valid –

- (a) the prospective spouses –*
 - (i) must both be above the age of 18 years; and*
 - (b) must both consent to be married to each other under customary law; and*
- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law”*

It was thus held that should the above requirements be met, the marriage is valid and binding. However, the court further held that the consent of the first wife is also a requirement for the validity of the marriage.

In considering whether section 7(6) of the Act, which reads as follows:

“A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriage.”

The court held as follows:

“To interpret it as imposing validity requirements over and above those set out in section 3 would undermine the scheme of the Recognition Act. For those reasons we endorse the Supreme Court of Appeal’s interpretation of section 7(6).”

The court held that that the provisions of section 3 provide the requirements for a valid marriage, and the provisions of section 7 merely govern the matrimonial property regime of such marriage.

The Supreme Court of Appeal held that a marriage concluded without an order of court, as provided for in section 7(6) of the Act, is valid and deemed to be a marriage out of community of property.

It is also of importance to note that section 4(9) of the Act clearly provides that the non-registration of the marriage does not in any way affect the validity thereof.

Chapter III and sections 18, 19 and 24 of Chapter IV of the Matrimonial Property Act apply to

customary marriages which are in community of property. Section 21 of the Matrimonial Property Act of 1984 is applicable to customary marriages contracted after 15 November 2000 where the husband does not have more than one spouse.

The proprietary consequences of customary marriages must always be borne in mind when a decree of divorce is sought. Just as in the case of civil marriages, proprietary consequences of civil marriages may change.

9.9 Dissolution by divorce

Since 15 November 2000, customary marriages, whether contracted before or after this date, may only be dissolved by a court order⁴³. The courts having jurisdiction in this respect are the high court and any regional court for a district contemplated in the Magistrates' Courts Act 32 of 1944.

The sole ground for divorce is the irretrievable breakdown of the marriage. That accords with the ground of divorce in a customary marriage. The circumstances that traditionally played a role in deciding whether a customary marriage may be dissolved therefore may still play a role.

9.9.1 *Locus standi in iudicio*

Both husband and wife are competent to institute proceedings for the dissolution of the marriage. Where the marriage is dissolved at the instance of the husband and he also claims the lobolo furnished, he has to cite the *lobolo* holder, normally the wife's father or his successor in title, as co-defendant. Where he is not joined, the question of lobolo would have to be disposed of in a later action between the husband and the wife's lobolo holder. This would, however, result in the splitting of the action.

Any division of the High Court would naturally have jurisdiction to hear a claim for return of *lobolo*. A court for a regional division may likewise have jurisdiction in a claim for the return of *lobolo*, on the basis of section 29 (1B) (a) and (b) of the Magistrates' Courts Act which reads as follows:

"(a) A court for a regional division, in respect of causes of action, shall, subject to section 28 (1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998).

(b) A court for a regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such a matter."

9.9.2 *Procedure*

The procedure used in obtaining the dissolution of customary marriages, is the same as obtaining a divorce in respect of civil marriages.

9.9.3 *Decree of divorce and maintenance*

A decree of divorce may only be granted on the ground of irretrievable breakdown of the marriage if the court is satisfied that the marriage relationship between the parties to the marriage has reached such a stage of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

9.9.4 *The patrimonial consequences of divorce*

When granting a decree for the dissolution of a customary marriage, the court has the powers contemplated in section 7, 8, and 10 of the Divorce Act and section 24(1) of the Mediation in Certain Divorce Matters Act. This means that the court has the same powers to regulate the financial consequences of divorce as a court has when a civil marriage is dissolved through divorce.

The court is empowered to incorporate a settlement agreement into the divorce order, to grant a post-divorce maintenance order for the benefit of a spouse, to grant a redistribution of assets if the marriage was subject to a total separation of property, to order a forfeiture of patrimonial benefits and to make an order regarding costs. The court may at a later stage rescind, vary or suspend a maintenance order or an order regarding the spouse's children. The pension interests of the spouses are deemed to form part of their assets upon divorce.

In the case of a husband who is a spouse in more than one customary marriage, the court is required to take all relevant factors into consideration and to make any equitable order that it deems just. Any contract, agreement or order made in terms of section 7(4)-(7) is specifically listed as one of the factors to be taken into account.

Section 7(4) applies where spouses in a customary marriage entered into before the commencement of the Act brings an application to change their matrimonial property system.

Section 7(5) regulates the position where spouses in a monogamous customary marriage entered into after the commencement of the Act wish to change their matrimonial property system.

Section 7(6) and (7) regulate the matrimonial property system in a polygynous customary marriage where a husband concludes one or more customary marriage after the commencement of the Act.

9.9.5 *The interests of the children*

The Act applies section 6 of the Divorce Act and the Mediation in Certain Divorce Matters Act to the dissolution of a customary marriage. In terms of the latter Act, it is the duty of a family advocate to institute an enquiry into the interests and welfare of children of spouses involved in a divorce action. Provision is made for similar involvement in respect of an existing order regarding guardianship, care and contact. Once the report and recommendation of the family advocate is submitted to court, an order regarding guardianship, care, contact and maintenance of children can be made.

In addition to the above the provisions of the Mediation in Certain Divorce Matters Act and section 6 of the Divorce Act, the Recognition of Customary Marriages Act empowers a court in terms of section 8(4)(d) to make an order with regard to the custody, access or guardianship of any minor children of the marriage. The Children's Act now refers to 'care' instead of custody and 'contact' instead of access. This is a welcome change because by custody people thought that the children are 'given' to the custodian parent.

9.9.6 *Maintenance*

Two provisions of the Act regulate post-divorce maintenance. Firstly, section 7(1) and 7(2) of the Divorce Act apply to customary marriages. In terms of these provisions the court may grant a maintenance order against a spouse. Secondly, when making an order for the payment of maintenance, it may take into account any provision or arrangement made in terms of customary law.

The payment of lobolo to the bride's father is probably a factor to be considered. That is if the *lobolo* is not returned. In the case of children, the payment of isondlo by the father to the person who maintained his child is a factor to be taken into account.

9.10 Dissolution of a customary marriage by death

The Act is silent on the dissolution of a customary marriage by death. In the absence of any specific provisions, customary law (with the exception of KwaZulu Natal) will apply.

In general terms this means that should the wife die first, her house continues to exist. Her husband may then take a seed-raiser, who is usually a family member of the deceased wife's family, to produce children. Children born in this manner are regarded as the offspring of the deceased wife.

9.11 Civil marriages

The Act provides that no spouse in a civil marriage is competent to enter into any other marriage. This means that they may not enter into another civil marriage with another person. It also means that

they may not enter into a customary marriage with each other or with another person. A marriage entered into contrary to the provision is void.

Spouses in a customary marriage are not competent to enter into a civil marriage with another person during the subsistence of the customary marriage. However, the Act creates an exception and makes it possible for spouses between whom a customary marriage exists to enter into a civil marriage with each other as long as neither is a spouse in a subsisting customary marriage with any other person.

9.12 Self-assessment

Indicate whether the following statements are TRUE or FALSE:

1. The Recognition of Customary Marriages Act implies that lobolo is a requirement for concluding a valid marriage.
 (a) **TRUE**
 (b) **FALSE**
2. The Recognition of Customary Marriages Act provides that customary marriages entered into before the commencement of the Act or 15 November 2000 should be registered within six months of the commencement of the Act.
 (a) **TRUE**
 (b) **FALSE**
3. In terms of the Recognition of Customary Marriages Act a marriage must be registered after the marriage negotiations have been completed.
 (a) **TRUE**
 (b) **FALSE**
4. The effect of the Black Administration Act on marriages of Black people was that spouses in a customary union were regarded as legally married to one another.
 (a) **TRUE**
 (b) **FALSE**
5. In terms of the now repealed section 22(6) of Black Administration Act, civil marriages of black persons were automatically out of community of property.
 (a) **TRUE**
 (b) **FALSE**

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STUDY UNIT 10

Ancillary marriage customs

10.1 Learning outcomes

After having studied this study unit, you should be able to

- explain how a family is perpetuated in terms of customary law.
- discuss the various customs aimed at perpetuating a family.
- analyse the significance of adoption in customary law

10.2 Devices for perpetuating the family

Apart from the usual customary marriages there are several cognate or similar unions, which may be regarded as devices for perpetuating the family.

The procreation of children, particularly male children, is extremely important. Certain Tswana communities say: “*Tsê ke go tsala bana*” (“to marry is to bear children”). This characteristic is particularly related to a belief in ancestral spirits.

Briefly, this amounts to the following:

The ancestral spirits live a life in a spirit world that is similar to that of the living on earth. The living must care for the ancestral spirits by continually making various sacrifices to them. The ancestral spirits, in turn, care for their living kin by ensuring their prosperity and well-being. As humans are mortal, the husband and wife must procreate children to ensure that they will be taken care of when they are ancestral spirits.

A widow continues to keep her status as ‘wife’ at her husband’s family home after his death. She is therefore expected to continue to give effect to one of the main objects of marriage, namely, the procreation of children. No widow who is young enough to bear children is required to live a chaste life after her husband’s death. In most communities, however, custom leads her husband’s relatives to prefer that such children should be fathered by a man of their own blood, rather than by an outsider to the family group to which they belong. If possible, therefore, she will be persuaded to accept as a consort one of her husband’s male relatives. She cannot be compelled.

The three main objects of providing a widow with a male consort are to

- enrich and strengthen the deceased’s family with more children;
- prevent strangers by blood from being attracted to her, which may happen if she is not so accommodated; and
- provide an heir for a man who has died heirless.

Thus, in order to compensate for infertility and to prevent the extinction of the family Africans have several customs by which children and an heir may be provided for a childless couple.

10.3 Seed-bearer

The concept “seed-bearer” (or seed-raiser) is also discussed in study unit 7 under the subject of succession. We need only repeat that it is a custom that the husband of a barren wife may marry seed-bearer (usually her sister) for the purpose of raising an heir in the house of the barren wife. In some communities two or three head of cattle are required in respect of the seed-bearer.

The seed-bearer has no status and is regarded as the “body” of the woman for whom she has to bear seed. The children born as a result of this substituted union will be regarded as the barren woman’s children. In an instance where a husband is impotent, an arrangement may be made that his wife procreates with a close male relative. Children born as a result of this union are regarded as the husband’s own children.

10.4 The *ukuvusa* union

Another custom, practised especially among amaZulu, is called *ukuvusa* (to “awaken” the name of a deceased). Section 1(3) (t) of the Natal Code defines *ukuvusa* as a form of vicarious union whereby the heir at law or other responsible person uses his own property or property belonging to the deceased to take a wife for the purpose of increasing or resuscitating the estate of such deceased person or to perpetuate his name and provide him with an heir.

Section 74 of the Code lays down that such a union is recognised as a customary marriage and section 75 provides that the effect of *ukuvusa* is to create a separate and entirely independent estate in the name of the deceased.

Ukuvusa is quite distinct from *ukungena* which is discussed below. The custom of *ukungena* is concerned with the widows of a deceased whilst *ukuvusa* is concerned with his property. *Ukuvusa* is generally resorted to in the case of a bachelor or where it is not possible to arrange the *ukungena* union.

In *Tekeka v Ciyana* the court said:

“The custom of ukuvusa is resorted to when a deceased person has left property, but no one to perpetuate his name, his natural heir (generally his full or half-brother) from natural affection, but more likely from superstitious fear, and in order to appease the spirits (amadhlozi) would, instead of appropriating the property altogether, take the deceased’s cattle and marry a wife who would be known as the deceased’s wife, and whose children would be known as his children so as to preserve his name from extinction. The house or houses so established rank as minor or subordinate houses of the surviving brother’s kraal.”

The heir born of such a union would only succeed to property in his mother’s house and not to the property of the home which his natural father inherited from the deceased.

10.5 The *ukungena* union

In customary law, the *ukungena* custom has far reaching consequences. It is a practice, usually resorted to in the case of childless widows, whereby a brother of the deceased husband or another near male relation is given access to the woman to procreate children, on behalf of her deceased husband.

In this section, the review of this custom is conducted from a perspective of the Zulu people, which is a fair reflection of the custom among other communities.

10.5.1 *Ukungena under the Natal Code of Zulu Law*

Section 1(3)(f) of the Code defines *ukungena* as a union with a widow undertaken on behalf of her deceased husband by his full or half-brother or other paternal male relative for the purpose of either raising an heir if there be none to inherit the property rights attached to the widow’s hut or, if she has male issue, of increasing the nominal off-spring of the deceased.

Section 71 of the Code lays down the essentials of a valid *ukungena* union as follows: -

- (i) The union must be contracted for one or other of the purposes specified in the definition above;
- (ii) The union must be entered into with the free consent of the woman;

- (iii) The union must be a family arrangement entered into with the approval of the family head, and, in the case of a traditional leader, where the raising of an heir to the chieftainship is involved, with the sanction of the majority of the community.
- (iv) No *lobolo* need be paid in respect of the union.

The off-spring of an *ukungena* union rank as if they were in fact children of the deceased husband. The union may be dissolved at any time by either party.

Before proceeding to discuss the legal implications of the custom it is as well to pause and consider the grounds upon which it may be defended. Many views have been expressed in connection with the custom.

Early Natal Government instructions on the matter read as follows:

“The Native custom, in accordance with which a junior brother takes the wives of his deceased elder brother, to raise up seed to the house of the latter, is so universal, and held in such respect by the Natives generally, that it is deemed undesirable to attempt to put a sudden stop to it... It is, however, a practice which the Government has always discouraged, and is still desirous of discouraging as far as it may be to do so.”

Again, the Cape Government Native Laws and Customs Commission of 1883 was of the opinion that the *ukungena* custom should not be countenanced.

10.5.2 Reasons for continued practice of the custom

We have not done research on the occurrence of the custom, but random enquiries from time to time reveal that it is still practised, but being a private family affair it is not pronounced from the rooftops.

The reasons for its perpetuation are probably one or more of the following:

- It is practised by many communities and forms part of their philosophy of life.
- It prevents disintegration on the death of the head of the family, a large establishment from being broken up, the women dispersed, and the children left without any person to care for their needs.
- It perpetuates the name of the deceased.
- The main object of the custom is to provide an heir to the deceased husband by uniting one of his widows with one of his near relatives, for the primary purpose of either preserving his name or to use his wives and property for the benefit of an heir to his house or estate.
- It has an ancient history.

Ukungena is an ancient custom. It is sometimes known as the levirate custom and one reads of this custom in the Bible (Genesis 38): “And Er, Judah’s first-born, was wicked in the sight of the Lord; and the Lord slew him. And Judah said unto Onan, go in unto thy brother’s wife, and raise up seed to thy brother.”

- It is not compulsory.
- The fact that the custom cannot, according to customary law as it is today, be forced upon the widow against her will makes ample provision for the custom not to be in conflict with human rights.

The union does not create legal obligations between the parties. In fact the union may be terminated unilaterally by either one of them. In traditional customary law the status of the children born from the union vis-à-vis children born from the marriage had to be resolved. The family head’s estate would now be wound up and cannot be revived after his death.

Children born from an *ukungena* union would succeed to their mother’s estate; vis-à-vis the male *ukungena* consort they would be regarded as his extra-marital children who could inherit from him.

10.6 Adoption

Adoption of children is not universally practised by black communities. The reason is probably that they believe that an adopted child is not a child in the proper sense – it is not the result of the *lobolo* agreement; it cannot be accounted for by the living to the deceased ancestors.

Probably the main reason, however, why formal adoption does not generally occur in customary law is that childless parents have other remedies than adopting children, for example, seed-bearers or the ukungena custom described above.

Historically, adoption was not practised in Natal and Zululand and an adopted son could not become an heir. Adoption was nevertheless practised by some communities in the Eastern Cape.

There are communities among whom it is customary for a house to adopt children belonging to the house of a woman in the same or a different family home, or children whose mother is dead, that is, children borne by a woman outside the house to which they become adopted.

In the case of *Sibozo v Notsokuvu*, the court said:

“It is not unusual for a Native having no male issue to adopt an heir, or, if a polygamist and having no male issue in one house, taking a son from one house and putting him in as heir to that house.”

This must be done at a family meeting and all the relatives, no matter, how distant, must be summoned to attend, and if they agree, the fact of adoption is reported to the senior traditional leader or headman of the location. Adulterine children, as they were then called, could not be adopted.

Nevertheless, even without the said formalities, there are probably many children who could prove, if necessary, that they have been adopted. Many parents simply treat these children as their own. However, if necessary, it should mostly be quite easy to prove that they have been adopted.

We have already dealt with the custom whereby, among some Cape communities (but not in Natal) the father of a child born to unmarried parents, may, by paying the customary damages for the seduction of its mother, acquire the child.

In *Thibela v Minister van Wet en Orde en andere* a husband adopted a child that his wife brought into the marriage. He was illegally killed by the police and the mother claimed damages, including maintenance for the child. The Minister of Justice objected saying that the child was not the deceased's. The judge held that the man had adopted the child, having negotiated it with the family and obtaining their approval.

In *Kewana v Santam Insurance Co Ltd* the court held that a duty of support or maintenance arising as a result of a valid customary law adoption is enforceable and not against public policy or principles of natural justice.

Thus, where the adoptive parent is negligently killed, the child adopted according to customary law is entitled to compensation for loss of support in terms of any applicable statutory measure and in the case where no statute exists, by the extension of the common law principles relating to the action for causation of death, that is the dependants' action (the *actio legis Aquiliae*).

In *Metiso v Road Accident Fund* the court was called upon to determine whether or not there is a legal duty to support in the circumstances described below.

The deceased, an unmarried male of Swazi origin, adopted two of his late brother's children in terms of customary law. The deceased was negligently killed in a motor vehicle accident. The deceased's late brother was married to a woman, who after her husband's death deserted the children and was never heard of. All efforts to trace her were fruitless. Immediately after the death of the father of these children, the deceased, who was still at school, was earmarked by the family as the person who had to take care of these children.

The court remarked:

“Die aanneming moes uitgevoer word omdat die biologiese moeder die stam onmiddellik na die biologiese vader se begrafnis verlaat het. Sedertdien weet die eiser of die familie nie waar sy haar bevind nie en is alle kontak met die biologiese moeder verbreek. Sy het op geen stadium enige navraag na die kinders gedoen nie, nooit bygedra tot hulle onderhoud nie en nog direk, nog indirek enige blyke van belangstelling in hul wel en weë getoon.”

The court held that the adoption was valid.

It is important to note that in this new constitutional dispensation, all suitably qualified persons may adopt a child. Persons who wish to adopt a child must meet the requirements provided in the Children's Act.

10.7 *Ukuthwala*

The literal meaning of *ukuthwala* is “to carry away”. This custom is practised mostly by communities in the Eastern Cape. It consists in a suitor carrying away (*thwala*) his fiancé. It is best described as a mock abduction with the girl's father's and brother's knowledge and consent. She is usually taken to the young man's family home. On arrival her father would be notified and asked to consent to his daughter being married to the man who executed *ukuthwala*. Therefore, the purpose of *ukuthwala* is to persuade both the families involved to commence negotiations on the proposed future marriage. Where the fathers on both sides agree to the marriage, they will enter into negotiations about lobolo. The *bopha* beast is linked up with the *ukuthwala* custom. It is regarded as a fine demanded by the girl's father from the family home of the young man who carried her away.

This demand is made before the marriage takes place and the claim is for one head of cattle called the *bopha* (elopement or reporting) beast. This beast, however, is reckoned as part of the *lobolo*.

In the case of *Mlotywa v Hoyo*, Brownlee cited two instances where the *bopha* beast was paid purely by the way of penalty. He said *inter alia*:

“It is a very common practice for young men to twala or carry off a young woman with the view to marriage, and should the marriage be offered, this carrying off constitutes no injury or affront to the girl or her father, but should the marriage not be offered it is an affront, and so far as this court is aware there are only two conditions under which a bopha beast or fine is paid upon the carrying off of a girl under the practice of ukuthwala: Should the girl have been deflowered, and should the young man fail to offer marriage or fail to pay dowry (lobolo)”.

In the normal course of events there is no coercion. If the girl is carried away forcibly the man may be charged with abduction. If in the process he has sexual intercourse with her against her will, it would constitute rape.

Bekker and Koyana described the harmless nature of the practice on the one hand as against the possibility that in some cases it might amount to the crime of abduction or of rape. (Bekker and Koyana *“The indomitable ukuthwala custom” De Jure* (2007)).

However, *ukuthwala* has lately triggered reports of abominable practices. Young girls, some school-going, are forcibly abducted and raped by older men under the guise of the custom. In *Jezile v S and Others* (unreported case, case no: 127/2014) the court held that *ukuthwala* is no defence for crimes of rape, human trafficking and assault.

Bennett examines the cultural defence and comes to the conclusion that the custom itself would not pass constitutional muster, unless it was proven to be justifiable and essential in a constitutional democracy.

The South African Law Reform Commission is investigating the practice, but appears to be obliged to accommodate persons who argue that it is an age-old custom that merely needs to be kept in check. In view of Bennett's analysis this attitude will in the present constitutional dispensation and social circumstances probably not hold water. The misdemeanours committed under the guise of *ukuthwala* are too ghastly to contemplate.

10.8 The *ngquthu* (or *nqutu*) beast

This custom is best described by referring to KwaZulu-Natal and the Eastern Cape.

10.8.1 KwaZulu-Natal

Section 1 of the Codes of Zulu Law defines the *ngquthu* beast “as beast that is payable by the husband or seducer as the case may be, to a woman or to the house to which she belongs, upon the entrance into a customary or civil marriage or the seduction of her daughter.”

It is dealt with in section 67 of the Codes as follows:

- (i) Upon a woman entering into a marriage for the first time, the *ngquthu* beast may, in addition to *lobolo*, be claimed, unless it has already been paid by the husband in respect of the woman's seduction or unless the woman has previously been seduced by some person other than the husband.
- (ii) The *ngquthu* beast shall be payable to the woman's mother, if alive, and together with its increase shall become her property, to be dealt with by her for the benefit of her house or as she may deem fit, and may not be attached except for her personal debts.
- (iii) If the woman's mother is divorced at the suit of her husband or, through no fault on the part of her husband wilfully deserts or abandons her family home, her right in and to the *ngquthu* beast lapses and terminates and it shall become the property of the house to which she belonged.
- (iv) If the woman's mother be not alive the *ngquthu* beast is payable to the house to which she belonged and together with its increase becomes the property of that house.
- (v) The *ngquthu* beast is not regarded as *lobolo* for the purpose of section 61 and is not recoverable upon dissolution by death or divorce of the marriage in respect of which it was paid.

10.8.2 The communities of the Eastern Cape

The custom among some of the Eastern Cape communities such as the *Fingo*, *Gaceka* and *Ngqika* is best described in the words of the African assessors in the case of *Kwatsha v Sihluku*:

“When a girl is seduced by a man with whom she has slept (and pregnancy does not follow) it would be called “ukuhewula”. The women of the kraal would take the girl to the kraal of the young man and would there pick out the best beast, take it away and slaughter it. That would dispose of the “ukuhewula”. The father or guardian would only take action when seduction is followed by pregnancy”.

In *Mampondo v Manqunyana* it was stated that where the seduction of a virgin did not result in pregnancy the fine payable was one beast known as the *isihewula* or *nqutu*.

10.9 Self-assessment

Indicate whether the following statements are **TRUE** or **FALSE**:

1. In terms of African custom, a widow, upon the death of her husband continues to keep her status as a 'wife'.
 (a) **TRUE**
 (b) **FALSE**
2. In customary law, a seed-bearer enjoys the status of *iqadi*
 (a) **TRUE**
 (b) **FALSE**
3. In terms of the former Natal Code of Zulu Law the off-spring of an *ukungena* union ranked as if they were children of the deceased husband.
 (a) **TRUE**
 (b) **FALSE**
4. In terms of customary law, the house of traditional leaders is involved in the initiation of the *ukungena* custom.
 (a) **TRUE**
 (b) **FALSE**
5. The *ukungena* custom can also be referred to as *ukuthwala* custom.
 (a) **TRUE**
 (b) **FALSE**

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